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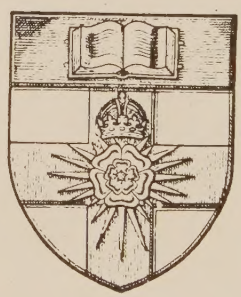

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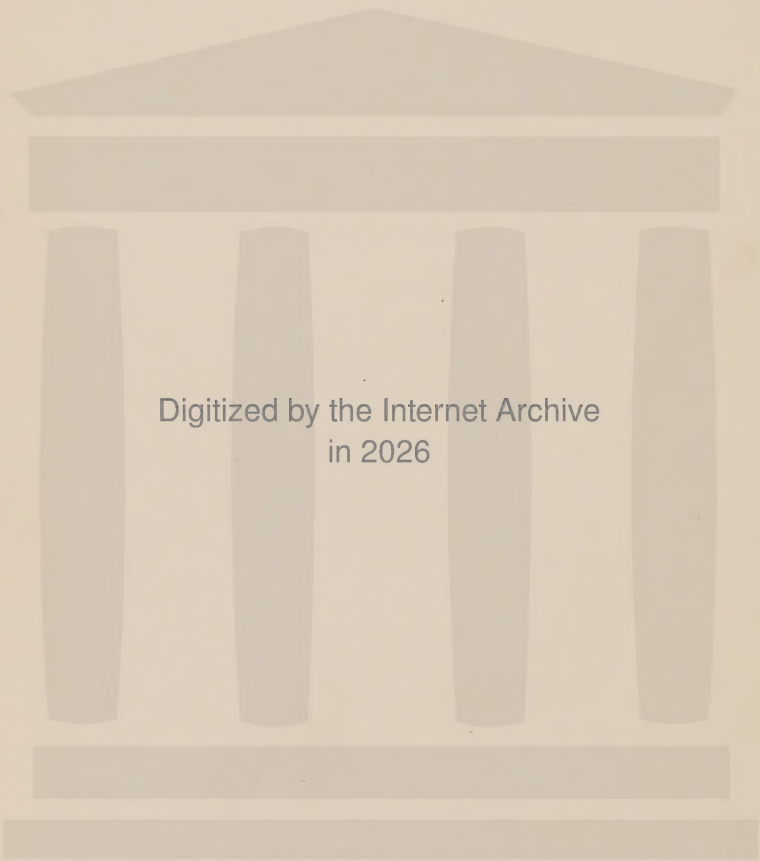

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# THE NORTHERN IRELAND LAW REPORTS

1939

THE

# NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

*NORTHERN IRELAND*

EDITED BY

MARCUS D. BEGLEY,

ONE OF HIS MAJESTY'S COUNSEL.

1939

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**Lord Chief Justice:**

THE RIGHT HON. JAMES ANDREWS.

**Lords Justices of Appeal:**

THE RIGHT HON. RICHARD BEST.
THE RIGHT HON. ANTHONY BRUTUS BABINGTON,
THE RIGHT HON. EDWARD SULLIVAN MURPHY.

**Chancery Division:**

THE HON. ROBERT DICK MEGAW.

**King's Bench Division:**

THE RIGHT HON. THOMAS WATTERS BROWN.

**Judicial Commissioner Land Purchase Commission**

THE HON. ROBERT DICK MEGAW.

**Attorney General:**

EDWARD SULLIVAN MURPHY, ESQ., K.C., M.P.
ARTHUR BLACK, ESQ., K.C., M.P.

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[These Reports will be cited as follows :—[1939] N.I.].

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IN THE MATTER OF LOUIE HARRIS, A BANKRUPT.

The assignees applied to the Court for an order that E. H. R. be adjudicated a bankrupt as a partner with L. H., already adjudicated in the business of H. & Co.

Brown, J., sitting in bankruptcy, made an order that E. H. R. was at the time of the adjudication of L. H. a partner in the business of H. & Co., and that he be adjudged bankrupt.

E. H. R. appealed to the Court of Appeal.

During the course of the argument in the Court of Appeal, counsel on behalf of the assignees admitted that no act of bankruptcy had been committed by him.

*Held*, by the Court of Appeal (Andrews, L.C.J., Best, L.J., and Babington, L.J.), that the clause in the notice of motion asking that E. H. R. be declared to be a partner in the business of H. & Co. was merely ancillary to the prayer for adjudication; and that, the Court being of opinion that the adjudication must be annulled, the declaration of partnership must as a consequence also fall.

*Held, further*, that by reason of the provisions of section 66 of the Bankruptcy (Ireland) Amendment Act, 1872, the Judge in Bankruptcy had no jurisdiction to make the declaratory order of partnership in the bankruptcy matter as against a stranger to the bankruptcy proceedings.

The principle stated by Lord Selborne in *Ellis v. Silber* (L.R. 8 Ch. A.C. 83, 86) applied.

*Held, also*, applying *Ex parte Brown, in re Yates* (11 Ch.D. 148) that such an application would not be in accordance with the practice of the Court.

The order of Brown, J., was consequently set aside.

APPEAL from an order of Brown, J. (sitting in Bankruptcy) declaring Edwin H. Rand to be a partner with Miss Louie Harris (who had already been adjudicated bankrupt) in the business of Harris & Co., and that he be adjudicated bankrupt as a partner in that business.

The bankrupt, Miss Louie Harris, was adjudicated on 19th November, 1937. At the date of adjudication the bankrupt owed Messrs. Holmes, Mullin & Dunn, Ltd., the sum of £822 1*s.* 4*d.* for goods sold and delivered, and a proof of debt for that sum was afterwards admitted.

Harris & Co. had been garage proprietors and had purchased considerable quantities of petroleum spirit and motor oils for retail sale from Holmes, Mullin & Dunn, Ltd.

The garage premises from which the business of Harris & Co. was carried on were acquired about

January, 1936, and it was at this time that Holmes, Mullin & Dunn, Ltd., first entered into business relations with that firm.

According to an affidavit of Roland Ross Dunn, a director in the firm of Holmes, Mullin & Dunn, Ltd., practically all business dealings between the two firms, from the beginning, were carried on on behalf of Harris & Co. by Edwin H. Rand. He stated that Miss Louie Harris was also in the firm but that Edwin H. Rand appeared to take more to do than she did with the running of the business.

In August, 1936, Edwin H. Rand was taken into the employment of Holmes, Mullin & Dunn, Ltd., as a salesman and continued with them until October, 1937, but throughout this period he continued to live on the garage premises of Harris & Co.

Roland Ross Dunn also stated in his affidavit that in April, 1937, the amount owing to Holmes, Mullin & Dunn, Ltd., began to increase rapidly and during the next four or five months he was continually pressing Edwin H. Rand, whom he always took to be a partner in the business and who always conducted himself as such, to have the account reduced. In all the dealings he had with Edwin H. Rand the latter always held himself out to be a partner in the business of Harris & Co., and on several occasions informed him that he had an interest in the firm.

Roland Ross Dunn also stated that at the beginning of April, 1937, he had an interview with Edwin H. Rand and Miss Louie Harris together, and that at this interview Edwin H. Rand definitely gave him to believe that he was a partner in the business and this was not denied by Miss Louie Harris.

He also stated that at a further interview that he had with Edwin H. Rand the latter stated that he had some £800 of his own money in the business. Roland Ross Dunn further stated that the business relationship of Rand with the bankrupt was very close.

Miss Louie Harris took protection of the Court on 14th October, 1937. She stated in her evidence before the Judge in Bankruptcy that Edwin H. Rand was never a partner and that the business was entirely her

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IN THE MATTER OF LOUIE HARRIS, A BANKRUPT.

own. This evidence was supported by Edwin H. Rand.

Edwin H. Rand appealed from the order of Brown, J., to the Court of Appeal.

*McGonigal, K.C.* (with him, *Copeland*), for the appellant :—

We rely on section 20 of the Bankruptcy (Ireland) Amendment Act, 1872, under which an adjudication can be obtained by one or more creditors for the sum of £40 at least.

The debt of the creditor must be a liquidated sum. *Ex parte Muirhead. In re Muirhead* (1).

We also contend relying again on section 20 that an application for adjudication should be made by petition and not by notice of motion.

Each party must have committed an act of bankruptcy and there is no suggestion that the appellant had committed such an act.

We submit that the law is correctly stated in *Lindley on Partnership* (10th ed.) at page 764 : " In " order to sustain a joint adjudication against two or " more persons, it is necessary that some act of bankruptcy shall have been committed by each of them." *Mills v. Bennett* (2), *Ex parte Addison* (3).

The only act of bankruptcy was committed by the bankrupt Louie Harris, the appellant had nothing to do with this act.

There was no debt due by the appellant to the assignees who had obtained the adjudication.

[*Warnock, K.C.* : I do not propose to defend the adjudication as I admit that no act of bankruptcy was committed by the appellant.]

We submit that the Judge in Bankruptcy had no jurisdiction to make the order declaring the appellant a partner, he being a stranger to the bankruptcy proceedings, and we rely on section 66 of the Bankruptcy (Ireland) Amendment Act, 1872. We rely on the decision in *Ellis v. Silber* (4), and especially on the words used by Lord Selborne in his judgment.

(1) 2 Ch.D. 22, 28.
(2) 2 M. & S. 556.
(3) 3 De G. & S. 580.
(4) L.R. 8 Ch.A.C. 83, 86.

Assuming that the Judge in Bankruptcy had jurisdiction to hear the application, it was quite contrary to the practice of the Court of Bankruptcy to entertain such an application in a matter that was disputed. *Ex parte Brown, In re Yates* (1).

The conduct of Messrs. Holmes, Mullin & Dunn, Ltd., showed that they looked upon Miss Louie Harris as being personally liable to them.

We submit that the Judge in Bankruptcy should have stayed his hand and allowed the matter to be decided by another Court. This is essentially a question for a jury of business men to decide.

We submit that when all the facts are examined, it is clear that there was no partnership between Miss Harris and the appellant. A debtor's summons was issued against Miss Harris trading as Harris & Co. The appellant admits that he assisted Miss Harris as a friend.

There is a question to be inquired into but not in the Court of Bankruptcy.

*Warnock, K.C.* (with him, *J. D. Chambers*), for the assignees :—

[Warnock, K.C., stated that he took the blame for the Judge in Bankruptcy having found that there had been an act of bankruptcy on the part of the appellant. The judge had every right to rely upon him, but his mind had been so pre-occupied with other matters at the time the matter was before the Bankruptcy Court that the point had escaped him.]

We submit that *Ellis v. Silber* (2) is no authority for the proposition advanced on behalf of the appellant. *Ellis v. Silber* (2) merely decided that the Court of Bankruptcy had not an exclusive jurisdiction, but that the Court of Chancery still had a jurisdiction.

It is pointed out in *Williams's Bankruptcy Practice* (13th ed.) at page 393 that the observations of Lord Selborne, L.C., dealing with the jurisdiction of the Court of Bankruptcy in *Ellis v. Silber* (2) were not necessary for the decision of the case.

(1) 11 Ch.D. 148, 149. (2) L.R. 8 Ch.A.C. 83.

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The statement of Lord Selborne, L.C., in his judgment in *Ellis v. Silber* (1) must be read in the light of the facts of that particular case.

We submit that we are entitled to the declaration of partnership made by Brown, J.

ANDREWS, L.C.J.

ANDREWS, L.C.J. : The very proper manner in which this appeal has been met by Mr. Warnock permits me to deal with the matter briefly.

An application was brought on 18th February last before Mr. Justice Brown sitting in bankruptcy by notice of motion made on behalf of the assignees of Louie Harris, a bankrupt, for an order that Edwin H. Rand be declared to be a partner with Miss Louie Harris (who had already been adjudicated bankrupt) in the business of Harris & Company, lately carried on at Cross Garage, Lower Castlereagh, County Down, and that the said Edwin H. Rand be adjudicated a bankrupt as a partner in the said business. Mr. Justice Brown made an order in the terms of the notice of motion.

In his judgment, after carefully reviewing the facts, Mr. Justice Brown said : " I am compelled by the " evidence before me to come to the conclusion that " Mr. Rand is in fact a partner in this business, and I " accordingly so declare him to be, and his adjudication " follows as a matter of course."

Mr. McGonigal, who appeared on behalf of the appellant, Edwin H. Rand, made several submissions in support of the appeal. He referred us to section 20 of the Act of 1872, under which an adjudication can only be obtained by one or more creditors for the sum of £40 at least. Secondly, as a matter of procedure he contended, again relying upon section 20, that an application for adjudication should be made by petition at the suit of a creditor and not by notice of motion. Further, he submitted that his client had committed no act of bankruptcy ; and that in fact the only act of bankruptcy was committed by the bankrupt, Louie Harris.

(1) L.R. 8 Ch.A.C. 83, 86.

During the course of Mr. McGonigal's argument on the first point, in which he stressed the fact that there was no debt whatever due by Mr. Rand to the assignees who had obtained the adjudication, Mr. Warnock intervened to intimate that he did not propose to defend the adjudication as he admitted that no act of bankruptcy had been committed. He urged, however, that he was entitled to the declaration of partnership which was made by Mr. Justice Brown.

In regard to this contention I may say in the first place that all the members of the Court are agreed that the clause in the notice of motion asking that Edwin H. Rand be declared to be a partner in the business of Harris & Co. was merely ancillary to the prayer for adjudication, and it properly falls with the annulment of the adjudication.

We are, however, further agreed that, by reason of the provisions of section 66 of the Bankruptcy (Ireland) Amendment Act, 1872, the Judge in Bankruptcy had no jurisdiction to make the declaratory order of partnership in the bankruptcy matter as against a stranger to these proceedings.

Various reasons might be assigned for our so holding, but I am quite prepared to rest my judgment upon the principle enunciated by Lord Selborne in his judgment in *Ellis v. Silber* (1), where he said : " That " which is to be done in bankruptcy is the adminis- " tration in bankruptcy. The debtor and the creditors, " as the parties to the administration in bankruptcy, " are subject to that jurisdiction. The trustees or " assignees, as the persons intrusted with that adminis- " tration, are subject to that jurisdiction. The assets " which come to their hands and the mode of adminis- " tering them are subject to that jurisdiction ; and " there may be, and I believe are, some special classes " of transactions which, under special clauses of the " Acts of Parliament, may be specially dealt with as " regards third parties. But the general proposition, " that whenever the assignees or trustees in bankruptcy " or the trustees under such deeds as these have a " demand at law or in equity as against a stranger to

(1) L.R. 8 Ch. A.C. 83, 86.

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ANDREWS, L.C.J.

"the bankruptcy, then that that demand is to be prose-
"cuted in the Court of Bankruptcy, appears to me to
"be a proposition entirely without the warrant of any-
"thing in the Acts of Parliament, and wholly unsup-
"ported by any trace or vestige whatever of authority."

These words were no doubt spoken in what may be called a converse case to the present; but they have a very special application to and bearing on the matters before us for our decision.

I may add on the authority of *Ex-parte Brown, In re Yates* (1), that, even if I were wrong on the question of jurisdiction, an application such as the present would not in my opinion be in accordance with the practice of the Court.

For these reasons the order appealed from should never, in my opinion, have been sought, and it must, accordingly, now be set aside.

I wish it to be clearly understood that we decide the case solely on the grounds which I have mentioned; and I deliberately refrain from expressing any opinion on the merits—as to whether in fact any partnership did or did not exist.

BEST, L.J. BEST, L.J.: I agree and have only one word to add. I have been struck by the very handsome way in which Mr. Warnock has acted. It enhances my view of the very honourable position he holds at the Bar.

In my opinion, no act of bankruptcy had been committed by Rand.

BABINGTON, L.J. BABINGTON, L.J.: I agree.

Solicitors for the appellant: *George McIldowie & Sons.*
Solicitors for the assignees: *White, McMillan & Wheeler.*

J. McC.

(1) 11 Ch.D. 148.

## THE KING (KELLY) v. THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM (1).

C.A. 1938.

June 7.
June 20.

*Licensing Law—New Licence—Increase of twenty-five per cent. of population—Whether city, or ward, or district electoral division—Intoxicating Liquor Act (Northern Ireland)*, 1923 (13 & 14 *Geo.* 5, *c.* 12), *section* 9 (*c*), *Intoxicating Liquor and Licensing Act (Northern Ireland)*, 1927 (17 & 18 *Geo.* 5, *c.* 21), *section* 3 (6) (iv).

The prosecutor applied to the Recorder of B. under section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as amended by the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, section 3 (6) (iv), for a new licence for the sale of intoxicating liquor for consumption on or off the premises. He produced a certificate of the Minister of Home Affairs showing an increase of population of not less than twenty-five per cent. in the O. ward of the city, in which ward the premises were situate.

The objectors contended that under section 9 (*c*) of the Act of 1923, it was a condition precedent to the granting of a licence that there should be an increase of not less than twenty-five per cent. of the population of the city or town, whilst it was contended on behalf of the prosecutor that the requirements of the section were satisfied by such increase in population in the ward or district electoral division in which the premises for which the licence was sought were situate.

The Recorder followed the decision of the King's Bench Division in *The King (Rainey) v. The Recorder of Belfast and County Court Judge and Chairman of Antrim* ([1938] N.I. 10), that under section 9 (*c*) of the Act of 1923, there must be an increase of at least twenty-five per cent. in the population of a city or town before a new licence could be granted. He, therefore, refused the application.

The prosecutor applied to the King's Bench Division for a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the Recorder, on the ground that such order was erroneous in law. The King's Bench Division refused the application, and the prosecutor then appealed to the Court of Appeal.

On application to make the conditional order absolute, notwithstanding cause shown:

*Held*, by the Court of Appeal (Best and Babington, L.JJ.; Andrews, L.C.J., dissenting), that the requirements of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, are satisfied by a twenty-five per cent. increase in population in the ward or district electoral division in which the premises for which the licence is sought are situate.

(1) In the Court of Appeal before Andrews, L.C.J., Best, L.J., and Babington, L.J.

C.A. 1938.

THE KING (KELLY) v. THE RECORDER OF BELFAST AND COUNTY COURT JUDGE AND CHAIRMAN OF ANTRIM.

The decision as to the meaning of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, in *The King (Rainey) v. The Recorder of Belfast and County Court Judge and Chairman of Antrim* ([1938] N.I. 10) not approved.

*Held*, by Andrews, L.C.J., that under section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, it is a condition precedent to the granting of a licence that there should be an increase of at least twenty-five per cent. of the population of the city or town.

The conditional order was, therefore, made absolute.

CERTIORARI.

The prosecutor, James Kelly, of 215, 217 Beersbridge Road, Belfast, applied on 9th September, 1937, at Quarter Sessions, held at Belfast, for a certificate to entitle him to a licence to sell by retail for consumption on or off the premises all intoxicating liquor at the premises 19 Cregagh Road, in Ormeau Ward, one of the fifteen wards of the city of Belfast. The application was for a new licence under section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, as amended by section 6 (iv) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927.

The application came before the Recorder of Belfast. The Recorder refused the application on the ground that the King's Bench Division had decided in *The King (Rainey) v. The Recorder of Belfast and County Court Judge and Chairman of Antrim* (1), that before a new licence could be granted under section 9 (*c*) of the Act of 1923, there must be an increase of at least twenty-five per cent. in the population of a city or town.

At the hearing before the Recorder a certificate from the Minister of Home Affairs was produced certifying that the Minister was satisfied that there had been an increase of population of not less than twenty-five per cent. in the Ormeau Ward of the city of Belfast since the census ascertained next before the passing of the Intoxicating Liquor Act (Northern Ireland), 1923.

Section 9 (*c*) of the Act of 1923 provides that: "Where, owing to an increase of not less than twenty-"five per cent. of the population according to the

(1) [1938] N.I. 10.

"last census, there is a growth or an extension of any "city or town, and the licensing authority is satisfied, "after hearing any evidence tendered to it by any "resident or owner of property in such city or town, "that the restrictions in this section on the granting of "licences may be relaxed, the licensing authority may "grant a licence to any applicant notwithstanding "that the same would be otherwise forbidden by this "section :

"Provided that such licence shall be granted only "for the premises situate in the ward or district "electoral division in which such increase in population "has taken place, and in substitution for at least two "existing licences held in respect of premises situate "within the city or town (as the case may be) com- "prising such ward or district electoral division."

Section 3 (6) (iv) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, provides that : "The required increase of population shall be proved "by means of a certificate of the Minister of Home "Affairs that he is satisfied that there has been an "increase of not less than twenty-five per cent. since "the census ascertained next before the passing of "the Act of 1923."

The prosecutor applied to the King's Bench Division for a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the Recorder, on the ground that such order was erroneous in law. The King's Bench Division discharged this application, and the prosecutor then applied to the Court of Appeal for a conditional order for such writ of certiorari.

The prosecutor applied to have the conditional order made absolute notwithstanding cause shown.

*T. J. Campbell, K.C., Black, K.C.*, and *McSparran* for the prosecutor :—

In the case on which the Recorder relied, *The King (Rainey) v. The Recorder of Belfast* (1), the King's Bench Division held that there must be a twenty-five per cent. increase at least in the population of the city

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before a new licence could be granted and also that there must be an increase of twenty-five per cent. in the ward in which the premises proposed to be licensed were situate.

The matter in dispute lies in a very small compass. It depends upon the construction of section 9 (*c*) of the Act of 1923.

If, as was contended, the increase should apply to the whole city, the result would be fanciful, for an increase of 100,000 would be required in the city before a single new licence could be obtained.

[ANDREWS, L.C.J.: If the boundary was extended the increase could be had in that way.]

Yes, but the section deals with the question of growth.

The draftsman added the latter portion of the sub-section to make the meaning of the sub-section clear.

We submit that there is no authority in the Act to make necessary the two increases, one in the city, and another in the ward.

[ANDREWS, L.C.J.: Do you submit that once there is an increase of twenty-five per cent. in a ward, a new licence could be got even if the total population of the city had fallen, say, by ten per cent. ?]

If there is a growth in the city or town.

[ANDREWS, L.C.J.: Your answer is that once there is an increase of twenty-five per cent. in a ward, a new licence can be got even if there is a reduction in the remainder of the city.]

There is the obligation of extinguishing other licences.

[ANDREWS, L.C.J.: Suppose in an extreme case there is an increase in one ward and reductions in the other fourteen wards, is it your submission a new licence can be got for the ward in which the increase has taken place ?]

Yes, if there has been growth of the city.

If the main part is not clear and the proviso is clear, the proviso repeals the main part.

We rely on *Attorney-General v. Governor and Company of Chelsea Waterworks* (1), where it was held that where

(1) Fitz. G. 195.

the proviso of an Act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers.

We submit that the statement in *Craies on Statute Law* (3rd ed.), at page 196, dealing with the construction of repugnant provisoes is a correct interpretation of the law.

It is clear, beyond controversy, that there must be an increase of population in the ward.

The Court is asked to spell out of the words in the section the meaning that there must be an increase of twenty-five per cent. in the population of the city.

We submit that the section should not be so construed.

The mischief that the Act was intended to deal with was the existence of redundant licences.

We submit that the Court should adopt the interpretation that would deal with the mischief aimed at.

We submit that the law is correctly stated in *Craies on Statute Law* (3rd ed.), page 91, where the rules for construing an obscure enactment are considered.

Section 9 contains a prohibition of the granting of licences except in certain cases. That was a prohibition of the granting of redundant licences. The section contemplated that when a city increased the opportunities for refreshment should also increase.

Section 3 (6) (iv) of the Act of 1927 contains the form of the certificate of the Minister of Home Affairs and provides that the required increase of population shall be proved by means of that certificate.

We submit that the certificate of the Minister of Home Affairs is conclusive and exclusive. The required increase of population is to be proved in one way only, and that is by means of that certificate.

We rely on the words used by Lord Shaw of Dunfermline in delivering the judgment of the Privy Council in *Shannon Realties v. St. Michel* (*ville de*) (1), where he said, " Where the words of a statute are clear they " must, of course, be followed ; but, in their Lordships' " opinion, where alternative constructions are equally " open, that alternative is to be chosen which will be

(1) 1924 A.C. 185, 192, 193.

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"consistent with the smooth working of the system "which the statute purports to be regulating, and that "alternative is to be rejected which will introduce "uncertainty, friction or confusion into the working "of the system."

Section 9 should be looked at as a whole. That section provided that no new licences should be granted in future except in certain circumstances.

We rely on the words used by Palles, C.B., in *The King (Wright) v. Justices of Cork* (1), where he dealt with section 3 of the Licensing (Ireland) Act, 1902, which is identical with section 9 (*b*) of the Act of 1923. The only difference is that the proviso is not to be found in section 3 of the Act of 1902.

Palles, C.B., referred to "the object of this provision" (the provision for suitable premises in the immediate vicinity of the formerly licensed premises) as "being one for the benefit of the public, to prevent "inconvenience to it by the permanent closing of a "public house, presumably required, without a sub-"stitute being provided, the words should *primâ facie* "be construed so as to make the remedy co-extensive "with the mischief."

We also rely on the words used by Madden, J., in his judgment in *The King (Supple) v. Justices of Clare* (2), where he said, "For the exception in the "3rd section was passed in the interests of the locality. "The mischief against which it was directed was the "loss to a vicinity of a public house to which it was "fairly entitled, by reason of the landlord neglecting "or refusing to apply for a new licence on the expiration "of a lease. This is evident from the language of "the section. It is not concerned with the protection "of any *quasi proprietary* interests which might have "attached to the old licence."

Wright, J., in his judgment used similar language when he said, "As pointed out by the Lord Chief "Baron in the case of *The King (Wright) v. Justices of* "*Cork* (3), section 3 was passed in the interest of the

(1) [1906] 2 I.R. 349, 354.
(2) [1907] 2 I.R. 299, 305, 307.
(3) [1906] 2 I.R. 349.

"public, so that a locality might not suffer by a "house losing its licence in consequence of the expira- "tion of the lease under which it was held, and the "licence being thereby extinguished."

These cases were followed recently by the King's Bench Division in *The King* (*Mulhern*) *v. Recorder of Londonderry* (1). That was a case where a new licence was sought. It was contended in that case that the right to get a licence was conferred merely on the lessee of the premises, but the King's Bench Division held that the section was passed in the interests of the public. The applicant for the new licence was not the old licensee and the King's Bench Division held that the Recorder of Londonderry was wrong in saying that he could not get a licence. That established the point that a district was not to suffer by the losing of a licence.

We submit that section 9 (*c*) of the Act of 1923 was similarly passed in the interests of the public. Section 9 (*b*) which applied to the case of *The King* (*Mulhern*) *v. The Recorder of Londonderry* (1), dealt with a new licence in an old district and section 9 (*c*) which applies to the present case deals with a new licence where a new locality grew up.

There had been remarkable growth in this Ormeau Ward. The object of section 9 (*c*) was to provide facilities in such a new district. The provision of new licences for new districts was perfectly natural.

Where a city has grown, new licences are to be available for districts in which there have been extensions but so that the number of licences should not be increased.

The Act aimed at a re-distribution and diminution of licences.

The words "increase in population" must mean increase in population in the ward. Increase of population must be in ward percentage. The increase in population must be in a specific ward. Such increase in population must be referable to the ward.

There is surely some significance in the use of the words "the ward" in the section.

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We rely strongly on the proviso to section 9 (*c*). If the decision of the King's Bench Division in *The King* (*Rainey*) *v. Recorder of Belfast* (1) is to stand, there would be an absolute veto on new licences in Northern Ireland.

They also referred to Licensing (Ireland) Act, 1902, sections 4, 8.; *Murray v. Inland Revenue Commissioners* (2); Census (Ireland) Act, 1910, section 8; Census Act (Northern Ireland), 1936, section 6 (3).

*Beattie, K.C.*, and *Curran* for the objectors :—

The whole matter comes back to the simple issue what does the section say? Has the prosecutor brought himself within the section?

It is admitted on all hands that considering the enacting part of the section down to where the proviso began, the condition required was that there should be a growth or extension of the city. A growth and extension of the city by the increase of twenty-five per cent. of the population, and persistently that qualifying sentence has been ignored. A city might extend for three hundred miles and not be within the section.

Increase and growth and extension meant nothing unless due to increase of the population. Until that first condition of growth or extension of the city owing to increase of population was satisfied, the prosecutor could not go any further, and it did not become necessary to discuss wards or the proviso about the increase in wards.

The proviso had been dealt with before coming to the main part of the section and as if it were the main part of the section.

[BEST, L.J.: You say there must be an increase in Belfast of twenty-five per cent. in the city and twenty-five per cent. in the ward?]

Yes, in the city.

[BEST, L.J.: And in the ward.]

It is not necessary to answer that question.

Except in certain cases the policy of the Act was to prevent or restrict the issue of licences.

(1) [1938] N.I. 10. (2) [1918] A.C. 541.

The Act provided that in the case of the city or town the rigidity of the Act might be relaxed.

The main part of the section provided that where there had been an increase of twenty-five per cent. in the city, the licence might be granted if the conditions were fulfilled.

The proviso is something which restricts the relaxation granted generally.

It is a condition precedent that there must be an increase of population of the city of at least twenty-five per cent.

If the arguments urged on behalf of the prosecutor are correct there is no necessity for the main part of the section, and no effect would be given to the main part of the section. The governing words of the section would be ignored.

We rely strongly on the words used by Megaw, J., in *The King (Rainey) v. The Recorder of Belfast and County Court Judge and Chairman of Antrim* (1).

The law in the present case is not to be determined by the certificate of the Minister of Home Affairs.

The rules of construction referred to in cases which have been cited, have no application to the present case.

It all comes back to this, what is the meaning of the section in the Act of Parliament ?

"Such increase of population" might mean an increase of twenty-five per cent. reflected in the particular ward, or an increase of twenty-five per cent. in the whole city, and an increase of twenty-five per cent. in the particular ward. It is not necessary to answer the question whether there must be an increase of twenty-five per cent. both in the city and in the ward.

Until the initial condition of growth or extension of the city owing to an increase of population of twenty-five per cent. is satisfied, we submit there is no jurisdiction to entertain the application.

There must be an increase in the city or town and there must be an increase in the ward.

The sole purpose of the proviso was that the licence

(1) [1938] N.I. 10, 18.

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should be granted for premises situated in the ward where there was increase of population. This proviso was in the nature of a restriction on the relaxation already granted.

The unit is city or town and the population in which the increase is to take place is the population of the city or town.

There was no need for the words "a growth or an "extension of any city or town" if the section is to be construed in the way urged on behalf of the prosecutor.

Before the licence sought could be granted a Court must be satisfied that there had been a twenty-five per cent. increase in the population of the whole city.

No reason has been shown why the decision of the King's Bench Division in *The King* (*Rainey*) *v. The Recorder of Belfast* (1), should be departed from.

*T. J. Campbell, K.C.* (in reply) :—

The public interest should be considered.

We submit that the law is correctly stated by Sir John Nicholl in his judgment in *Brett v. Brett* (2), where he says, "The key to the opening of every law "is the reason and spirit of the law—it is the 'animus "'imponentis,' the intention of the law-maker, ex- "pressed in the law itself, taken as a whole. Hence, "to arrive at the true meaning of any particular "phrase in a statute, that particular phrase is not to "be viewed detached from its context in the statute; "it is to be viewed in connection with its whole context "—meaning by this as well the title and preamble as "the purview or enacting part of the statute."

The Court should endeavour to avoid a nonsensical result.

*Cur. adv. vult.*

ANDREWS, L.C.J.

June 20.

ANDREWS, L.C.J. : The point involved in this case is a short one, depending entirely upon the true construction of section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland,) 1923. This sub-section reads as follows :—

(1) [1938] N.I. 10. (2) 3 Add. 210, 216.

"Where, owing to an increase of not less than "twenty-five per cent. of the population according "to the last census, there is a growth or an ex- "tension of any city or town, and the licensing "authority is satisfied, after hearing any evidence "tendered to it by any resident or owner of property "in such city or town, that the restrictions in this "section on the granting of licences may be relaxed, "the licensing authority may grant a licence to any "applicant notwithstanding that the same would "be otherwise forbidden by this section.

"Provided that such licence shall be granted only "for premises situate in the ward or district electoral "division in which such increase in population has "taken place, and in substitution for at least two "existing licences held in respect of premises situate "within the city or town (as the case may be) "comprising such ward or district electoral division."

It is contended on behalf of the objectors that under this section it is a condition precedent to the granting of a licence thereunder that there should be an increase of not less than twenty-five per cent. of the population of the city or town ; whilst on behalf of the prosecutor —the unsuccessful applicant for the licence—it is contended that the requirements of the section are satisfied by such increase in population in the ward or district electoral division in which the premises for which the licence is sought are situate. No other section of the Act has been referred to as throwing any light upon a question which has already given rise to difference of judicial opinion—a difference which, I regret to say, will also be found in the judgments of the members of this Court. In these circumstances I feel it necessary to make a more detailed examination than I would otherwise have done of the words of the sub-section which I have read, and also of the principles of the construction of statutes which appear to me to be relevant.

I take first the opening words of the enacting part of the sub-section :—"Where owing to an increase of "not less than twenty-five per cent. of the population "according to the last census, there is a growth or an

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"extension of any city or town." These words establish a condition precedent to the relaxation by the Court of the restrictions imposed by the section on the granting of licences. There must be a growth or an extension of the city or town, and such growth or extension must be due to and consequent upon an increase of not less than twenty-five per cent. "of the "population" according to the last census. The question simply is of what population must there be such an increase. If the matter rested there—as it in fact does under the main enacting words of the sub-section—could any one have the slightest doubt that "the population" which is there referred to by the legislature, is the population of the only area which has been mentioned, namely, the city or town. It is suggested on behalf of the prosecutor that there is room for doubt because the words used are "*the* "population" not "*its* population," and that the area is therefore left undefined. This suggestion does not appeal to me in any way. From the purely grammatical standpoint one would not expect to find such a use of the possessive pronoun preceding the noun to which it refers; and, in any event, it seems to me that its use is wholly unnecessary, for the population must be the population of the only area mentioned, i.e., the city or town. What is the alternative contended for? It is that we should read into or imply in the section after the words "the population" the further words "of the ward or district electoral "division"—words which never appear, and an area which is never referred to, until the proviso is reached several lines later in the section.

Accordingly, I entirely agree with the learned Recorder when he expresses the opinion in his judgment that "if there were nothing else in the section "by way of further definition the words 'the popula-"'tion' would naturally be taken to refer to the "population of the city or town." The only modification which I would personally make in this expression of opinion is that I would strengthen it by substituting the words "would necessarily be held" for the Recorder's "would naturally be taken"; for, it would

seem to me that it would be a necessary inference that the increase of population should be referable to the only unit of area mentioned. This, therefore, is the first point which in my opinion must be taken to be clearly and firmly established—that on the wording of the enacting portion of the section taken alone the unit of area in which the twenty-five per cent. increase of the population is required is the city or town.

But the argument for the prosecutor is that all this is altered by the terms of the proviso. After full and, I might say, anxious consideration I reject the argument, both because the words of the proviso in my opinion do not warrant any such conclusion, and also because the principle which it involves in reference to the construction of a section of an Act of Parliament containing a proviso is not in my opinion justified in law, and is in fact, as I conceive it, contrary to the highest judicial authority.

I shall, however, first examine the words of the proviso which, it is alleged, produce this somewhat startling result. The material portion of the proviso reads :—" Provided that such licence shall be granted " only for premises situate in *the* ward or district " electoral division in which *such* increase in population " has taken place." The whole argument rests on the two words " *the* " and " *such* " which I have italicized. It is contended that the use of the definite article " *the* " in place of the indefinite article " *a* " in connection with the words " ward or district electoral ' division " compels the conclusion that these words, signifying a new unit of area, must be implied in the earlier enacting portion of the section ; and it is further urged that the linking in the proviso of the words " *such* increase in population " to the unit of " ward or " district electoral division " demonstrates conclusively that the increase previously referred to must have related to the same unit. I am not impressed with either contention. In the first place, the words " the ward " must be read as if they were " the ward " or wards," not only because under section 1 (*b*) of the Interpretation Act, 1889, words in the singular shall include the plural, but also because to hold that they

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only applied to one ward would mean that when once a new licence had been granted under the sub-section in any particular ward of the city it would not subsequently be possible to get a new licence under the sub-section in any other ward of the city. If this be so, what becomes of the supposed magic of the words "*the* ward," which are alleged to have the effect of changing entirely the natural meaning of the enacting words of the section. In my opinion Mr. Justice Megaw was fully justified in saying that these words merely indicate the location in which the newly licensed premises shall be when the condition precedent of increase of population of the town has been established; and in my view the draftsman of the section, with this idea present to his mind, referred to the new unit of area as "*the* ward or district electoral division," as he knew that twenty-five per cent. increase in the city must result in twenty-five per cent. increase in at least one ward in the city. Secondly, what is the meaning and significance of the word "such." It is an adjective qualifying the noun, "increase"; and, accordingly, "such increase" simply means "the same "increase" or "a similar increase," i.e., the same or a similar increase in the newly mentioned unit of "the "ward" to the increase already mentioned in regard to the unit of the city or town, namely, the percentage increase of twenty-five. In further support of this view as representing the true meaning of the words I would direct special attention to the fact that the words of the proviso are not "such increase of population" or "such increase of the population," either of which might, perhaps, be reasonably said to refer to the actual total increase of the population as distinguished from the percentage increase. The words of the proviso are "such increase *in* population"—a phrase which may be simply interpreted as "such population-"increase," namely twenty-five per cent. When this meaning is assigned, as in my opinion it ought to be, to the words "increase in population" in the proviso it will be at once recognised that there is no conflict or repugnancy whatever between the enacting portion of the sub-section and the proviso. The whole sub-

section may be simply interpreted in this way. It is a condition precedent to the granting of a new licence under the main enacting part of the sub-section that there should be a twenty-five per cent. increase in the population of the city or town ; whilst under the proviso it is equally necessary that there should be a twenty-five per cent. increase in population in the particular ward or district electoral division in which the premises, for which the licence is sought, are situate.

It is, as it appears to me, a cardinal principle in the interpretation of a statute that when possible its provisions should be construed in such a manner as to avoid inconsistencies and repugnancies. In my opinion this result is best achieved in the present case by interpreting the section in the manner in which I have done.

If it be said, as it was urged in argument, that the necessity for a twenty-five per cent. increase of the population of a city or town would render the section nugatory, I would answer this argument by referring to the case of Bangor where such increase has already taken place. The possibilities of such an increase in Belfast, by the extension of the city boundary in the manner recently proposed or otherwise, are also by no means remote. In any event there can be no doubt that the policy of the Act of 1923, following that of the Act of 1902, obviously was to impose very serious restrictions upon the granting of new licences in Northern Ireland. This view is very clearly expressed in *The King* (*Rainey*) *v. The Recorder of Belfast* (1), by Megaw, J., who, as Parliamentary Secretary to the Ministry of Home Affairs, had charge of the Bill during its passage through Parliament. In its form and essence section 9 is a restriction section to which the enabling sub-sections are mere exceptions. This fact should not be lost sight of in the interpretation of any of its provisions. I would add that the hardship alleged to result from restricting the granting of new licences under the sub-section in the manner which I have indicated above is much mitigated, if not entirely removed, when it is

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borne in mind that for every new licence granted under it two existing licences must be surrendered—a net decrease of one.

Even if, however, I am wrong in the interpretation which I have given to the sub-section, and if such a repugnancy as is contended for exists between the words of the proviso and the enacting words of the sub-section, I would still feel unable to construe the sub-section, taken as a whole, in the manner which counsel for the prosecutor have asked us to do Mr. Black's method of construction seems to me to be entirely opposed to settled principle. He construes the section by commencing with the proviso, where the unit of area is the ward and where the increase in population clearly has reference to the ward. As this increase is referred to as "such increase," and as "such" is a referential term it must, he concludes, be the same increase (namely, a ward increase) which is referred to in the enacting part of the section. No authority for such a method of construing a section containing a proviso was cited though I appealed for it if it existed. The nearest approach to it to which Mr. Black was able to refer was the old case of *Attorney-General v. Governor & Company of the Chelsea Waterworks* (1728) (1), in which it was held that where the proviso of an Act of Parliament is directly repugnant to the purview of the Act, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers. In my opinion this case has no application to the present; for upon what I hold to be its natural and true construction the sub-section contains no repugnancy whatever.

The proper principle applicable to the construction of sections of Acts of Parliament containing provisoes is in my opinion to be found in the several speeches of the Law Lords in *Guardians West Derby Union v. Metropolitan Life Assurance Society* (2), a case which was not cited in argument. At pp. 651-2 Lord Halsbury, L.C., speaks of a system of construction under which "a proviso could be so read as to suggest "that the previous part of the section, of which it is a

(1) Fitz-G. 195. (2) [1897] A.C. 647.

"proviso, should imply by law the existence of words "there of which there is not a trace in the previous "words of the section itself." "My Lords," he says, "that certainly would be a very serious invasion upon "any rule of construction by which any document, "whether an Act of Parliament or anything else, has "ever been construed, and I should be very much "averse, indeed, to lend any countenance to such a "mode of construing a proviso."

I cannot conceive a more authoritative or a more vigorous condemnation of the precise method of construction contended for by the prosecutor in the present case. But the matter is one of such importance that I must prolong this judgment by showing how fully the learned Lord Chancellor's view was shared by the other Law Lords. "I am perfectly clear," said Lord Watson, "that if the language of the enacting "part of the statute does not contain the provisions "which are said to occur in it, you cannot derive these "provisions by implication from a proviso.

"When one regards the natural history and "object of provisoes, and the manner in which they "find their way into Acts of Parliament, I think your "Lordships would be adopting a very dangerous and "certainly unusual course if you were to import "legislation from a proviso wholesale into the body of "the statute, although I perfectly admit that there "may be and are many cases in which the terms of an "intelligible proviso may throw considerable light "upon the ambiguous import of statutory words." Lord Herschell expresses the same view at pp. 655-6. "I decline," he says, "to read into any enactment "words which are not to be found there, and which "would alter its operative effect because of provisions "to be found in any proviso. Of course a proviso "may be used to guide you in the selection of one or "other of two possible constructions of the words to "be found in the enactment, and show, when there is "doubt about its scope, when it may reasonably admit "of doubt as to its having this scope or that, which "is the proper view to take of it ; but to find in it an "enacting provision which enables something to be

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"done which is not to be found in the enactment "itself on any reasonable construction of it, simply "because otherwise the proviso would be meaningless "and senseless, would, as I have said, be in the highest "degree dangerous." Lord Shand expressed his agreement that a proviso "cannot be held to control the "substantive enactment"; and, finally, Lord Davey refers to "the old and apparently ineradicable fallacy "of importing into an enactment, which is expressed "in clear and apparently unambiguous language, "something which is not contained in it, by what is "called implication from the language of a proviso "which may or may not have a meaning of its own."

The passages which I have cited afford, in my opinion, a sufficient condemnation of the principle of construction contended for in the present case, under which recourse is first had to the terms of a proviso, which, misconstrued, as it seems to me, is then said to be repugnant to and must prevail over the clear, and, as I conceive, unambiguous terms of the enacting portion of the section.

One other case only would I refer to in connection with the principle of construction of provisoes, namely, *Duncan v. Dixon* (1), in which Kekewich, J., in referring to a particular argument, said that it claimed and derived support from the proviso, of which, according to the ordinary rules of construction, the effect must be to except out of the earlier part of the section something which, but for the proviso, would be within it. If the argument for the prosecutor were accepted in this case the effect would be, not to except something out of the earlier part of the section, but to widen its scope so as to permit of new licences being granted in cases not permitted by the earlier part of the section. In my opinion the proviso should restrict rather than extend the relaxation of the sub-section.

I conclude this judgment by merely referring to the admission necessarily made by both Mr. Campbell and Mr. Black on behalf of the prosecutor that upon their construction of the Act a licence might be granted under the sub-section in a ward showing a twenty-five

(1) 44 Ch.D. 211.

per cent. increase, provided there was an extension of the city in any direction, even though the population of the city as a whole showed no increase or even a reduction. I cannot believe that this was ever intended by the Legislature, and I must decline so to hold. I asked during the argument why any reference was made in the section to the city or town if the requisite percentage increase applied only to the ward or district electoral division, but I received no satisfactory reply.

In my judgment the conditional order granted to the prosecutor should be discharged with costs ; but, having regard to the views held by my colleagues, effect cannot be given to the opinion which I have expressed.

ANDREWS, L.C.J.

BEST, L.J. : The Intoxicating Liquor Act (Northern Ireland), 1923, made provision, according to its preamble, for the various matters mentioned therein, and in particular it made provision for amending the law relating to the sale and supply of intoxicating liquor by retail. The Act repealed the various enactments set out in its third schedule, and of these enactments the most important from the point of view of the present case is The Licensing (Ireland) Act, 1902, all of which was repealed.

BEST, L.J.

On comparing The Intoxicating Liquor Act (Northern Ireland), 1923, with the Act for Ireland of 1902, it will be apparent that the draftsmen of the Act of 1923 copied, no doubt in accordance with instructions, very closely the provisions of the Act of 1902. In fact, a comparison of the two Acts will make it clear that section 9 of the Act of 1923 contains, with certain modifications and slight alterations, all the salient provisions of sections two to eight, inclusive, of the Act of 1902. If, therefore, we desire to see what the meaning of section 9 of the Act of 1923 is, and in particular, what construction is to be placed upon sub-section (*c*) thereof, we are not only entitled but bound to examine the provisions of the earlier Act.

Section 4 has the side note " Limit as to population." This throws no light on what has been called in some of the cases " the drift of the section " and we may go

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straight to the section itself. Where, owing to increase in population, there is a growth or extension of any city or town and the licensing authority are satisfied that the restrictions in this Act on the granting of licences may be relaxed, they may grant a licence to any applicant notwithstanding that the same would be otherwise forbidden by this Act; provided that such licence shall be granted only for premises situate in the parish in which such increase in population has taken place, and in substitution for an existing licence or licences, etc.

It appears to me that the governing words are those concerned with the growth or extension of any city or town, and this growth or extension is shown by an increase in the population, and the licence may be granted only for premises situate in the parish in which such increase in population has taken place.

The quantity of increase is defined in section 8 thus :—"Increase in population" shall be taken to mean an increase of not less than twenty-five per cent. of the population according to the last census.

Is the increase thus contemplated an increase in the population of the whole city or an increase in the population of the parish in which the premises must be situated in order to be eligible for licensing? I think there can be only one answer to this question, and it has been the view of the profession, and, I believe, of the licensing authorities, for over twenty years that the requisite increase in population is satisfied by an increase in the local area specified and not in the whole city. After all, it is the inhabitants who are the cause of the growth or extension of the city or town that are to be catered for and their benefit and convenience should be looked to; see the observations of Palles, C.B., in *The King* (*Wright*) *v. The Justices of Cork* (1), at p. 354, and of Madden, J., at p. 305, and of Wright, J., at p. 307 in *The King* (*Supple*) *v. The Justices of Clare* (2).

The words "increase in population" in the opening lines of section 4 of the Act of 1902 are controlled by

(1) [1906] 2 I.R. 349, 354.

(2) [1907] 2 I.R. 299, 305, 307.

the proviso in the same section that such licence shall be granted only for premises situate in the parish in which such increase in population has taken place, and the only rational meaning that I can give to the section that an increase in population defined in section 8 of the Act of 1902 to mean an increase of not less than twenty-five per cent. of the population is referable to the local area and not to the city or town. How otherwise can the benefit and convenience of the inhabitants be provided for ?

No real grievance exists for those who take the view that the number of licences should not be increased, because the licence to be granted under section 4 can only be granted in substitution for an existing licence or licences held in respect of premises situate within the city or town, as the case may be, comprising the whole or any part of the parish. The scheme of the Act and of the section seems to be that if there should be a substantial increase (twenty-five per cent.) in the population of a parish and if the licensing authority should be satisfied that the restrictions in the Act on the granting of licences might be relaxed, they may grant a licence to any applicant notwithstanding that the same would be otherwise forbidden by the Act. I look upon this as a very important provision, showing, as I think it does, that regard was to be paid by the licensing authority to the known fact that the populations of districts frequently change, and that people who desire to be supplied with intoxicating liquor should have reasonable opportunities of being so supplied.

I have dwelt somewhat at length in commenting on the provisions of the Act of 1902 and particularly on those contained in section 4. I have already said that section 9 of our Act of 1923 contains substantially all the provisions of sections 2 to 8, inclusive, of the Act of 1902.

There are undoubtedly changes in the arrangement of the provisions and this must almost of necessity follow where seven sections (2 to 8) are to be compressed into one, viz., section 9, and there are slight alterations in the collocation of some words and

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phrases, but I think the draftsman of the Act of 1923 carried out faithfully the instructions, if such were given to him, to follow as closely as possible the relative provisions in the Act of 1902.

If I am right in holding that the increase in population contemplated by the Act of 1902 as a necessary preliminary to the granting of a new licence must be an increase in the parish and not in the city or town, then I think a different construction should not lightly be applied to section 9 (*c*) of the Act of 1923.

I have already adverted to the way in which sections 2 to 8 of the Act of 1902 were combined so as to give rise to section 9 of the Act of 1923. The important changes as regards the matter under discussion made in the latter Act were that, for the parish in the former Act in which the increase in population had taken place and in which the premises must be situate before a new licence could be granted, there was substituted in the later Act the ward or district electoral division in which the increase in population had taken place; next, it was a condition precedent to the granting of a new licence in such ward or district electoral division that it must be granted in substitution for *at least two* existing licences held in respect of premises situate within the city or town (as the case may be) comprising such ward or district electoral division; next, instead of having a special definition section 8 as in the earlier Act showing what the increase in population must be as a condition precedent to the granting of a new licence, the words defining the increase were introduced as follows into the Act of 1923 :—

> Section 9 (*c*). Where, owing to an increase of not less than twenty-five per cent. of the population according to the last census, there is a growth or an extension of any city or town, and the licensing authority is satisfied, after hearing any evidence tendered to it by any resident or owner of property in such city or town, that the restrictions in this section on the granting of licences may be relaxed, the licensing authority may grant a licence to any applicant notwithstanding that the same would be otherwise forbidden by this section.

And then comes the proviso that the licence shall be granted only for the ward or district electoral division in which such increase in population has taken place and in substitution for at least two existing licences held in respect of premises in the city or town comprising such ward or district.

Notwithstanding the transference of the words defining the percentage of increase of population from a separate section (8) as in the Act of 1902 to the position in which they are placed in section 9 (*c*) of the Act of 1923, I am of opinion that in this latter Act, just as in section 4 of the Act of 1902, the important matter to look at in construing the section is the fact that there is a growth or extension of any city or town, and that that growth or extension is to be measured by the growth in the population of the ward or district electoral division in which such increase in population has taken place.

It is said that if the proviso to section 9, sub-section (*c*), were not present, then the words "the population "according to the last census" could only refer to the population of the city or town as a whole, but the proviso *is* present and this is what has given rise to the whole difficulty in finding out what the section means.

The Legislature in 1923 stated in the preamble to the Act what was aimed at. The Act was intended to make provision for the closing on Sunday and Christmas Day of certain premises licensed for the sale of intoxicating liquor, the abolition of certain off-licences (commonly known as spirit grocers' licences), and the settlement of claims for compensation arising thereout; to impose restrictions on the sale of methylated spirits; and to amend the law relating to the sale and supply of intoxicating liquor by retail; and for purposes connected therewith.

It was no part of the policy of the Legislature that the granting of new licences should for all practical purposes be stopped. But if the judgment of the King's Bench Division is to stand, then this must be the result, because it is not suggested that in any city or town in Northern Ireland except in Bangor there

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has been or is likely to be an increase of twenty-five per cent. of the population according to the last census.

This construction, if right, makes the granting of new licences to all intents and purposes a dead letter. If such had been the intention of the Legislature, it would have been an easy matter to say so.

I have come to the conclusion that the view held by the learned Recorder, and acted upon by him prior to the decision of the King's Bench Division in the case of Roddy's application for a licence (1), is correct in point of law, and that the conditional order should be made absolute with costs.

BABINGTON, L.J.

BABINGTON, L.J.: The prosecutor, James Kelly, applied to the Recorder of Belfast at the Quarter Sessions on the 9th September, 1937, for a new publican's licence in respect of premises situate in Ormeau Ward within the county of the city of Belfast.

This application was made under section 9 (*c*) of The Intoxicating Liquor Act (Northern Ireland), 1923, as amended by section 3, sub-section 6 (iv) of the Intoxicating Liquor Act (Northern Ireland), 1927.

James Kelly could not succeed in obtaining his licence unless he established that there had been an increase of twenty-five per cent. in the population of the Ormeau Ward since the census ascertained next before the passing of the Act of 1923 and he produced a certificate of the Minister of Home Affairs to this effect purporting to be given pursuant to section 3 (6) of the Act of 1927.

Prior to the decision of the King's Bench Division in *The King (Rainey) v. The Recorder of Belfast and County Court Judge and Chairman of Antrim* (1), the Recorder had granted new licences under the Act of 1923 upon proof of an increase of twenty-five per cent. in the population of the ward or electoral division in which the premises were situated, but in *Rainey's case* (1), an appeal was taken to the King's Bench Division and a conditional order to quash the granting of a licence to Rainey was made absolute, Brown and

(1) [1938] N.I. 10.

Megaw, JJ., holding that under section 9 (*c*) of the Intoxicating Liquor Act (Northern Ireland), 1923, there must have been a twenty-five per cent. increase in the population of the whole city or town as well as of the ward or electoral division in which the premises were situate before an application for a new licence could be entertained.

Objection was taken to the granting of James Kelly's application grounded upon the decision in *Rainey's case* (1), and as it was conceded by the applicant that there had not been an increase of twenty-five per cent. in the population of the whole city of Belfast within the required period, the Recorder, following the decision of the King's Bench Division in *Rainey's case* (1), refused the application, the order appearing in the Licensing Register being as follows :—

"It appearing that there has been an increase of "the population since the last census ascertained "next before the passing of the Licensing Act, "1923, (*a*) of less than twenty-five per cent. in the "case of the city of Belfast and (*b*) of more than "twenty-five per cent. in the case of Ormeau Ward "in which the premises proposed to be licensed are "situated. And such increase being insufficient in "law to warrant the granting of a certificate for a "licence.—Refuse the application on that ground."

James Kelly then applied for a conditional order to quash this decision and upon the King's Bench Division making no rule on the motion, he appealed to this Court, and on the 25th April, 1938, the order of the King's Bench Division was discharged and the conditional order granted.

This conditional order was in its turn discharged by the King's Bench Division on the 17th May, 1938, and from that order the present appeal was taken.

The ground upon which this Court granted the conditional order was that "The said order of the said "Recorder was erroneous in point of law," and we have only to deal with the construction of section 9 (*c*) of the Act of 1923, all other questions relative to the granting or refusal of this licence being for the

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Recorder in the event of the application coming before him again.

The Licensing (Ireland) Act, 1902, put an end to the granting of new licences for the sale of Intoxicating Liquor in Ireland absolutely except in certain specified cases, and this Act remained in force in Ireland and from 1921 in Northern Ireland until the passing of the Intoxicating Liquor Act (Northern Ireland), 1923, which repealed the Act of 1902 and by section 9 re-enacted the main provisions of the earlier Act with certain additions and omissions.

It will be necessary to examine this earlier Act which has a direct bearing on the construction of the Northern Ireland Act of 1923, but before comparing the two statutes I will deal with section 9, sub-section (*c*), of the Act of 1923, upon which the appeal turns, to see whether there is any difficulty in construing it apart altogether from its legislative background. Its terms are as follows :—

> "Where, owing to an increase of not less than "twenty-five per cent. of the population according "to the last census there is a growth or an extension "of any city or town, and the licensing authority is "satisfied, after hearing any evidence tendered to "it by any resident or owner of property in such "city or town, that the restrictions in this section "on the granting of licences may be relaxed, the "licensing authority may grant a licence to any "applicant notwithstanding that the same would be "otherwise forbidden by this section.
>
> "Provided that such licence shall be granted only "for premises situate in the ward or district electoral "division in which such increase in population has "taken place and in substitution for at least two "existing licences held in respect of premises situate "within the city or town (as the case may be) "comprising such ward or district electoral division."

What is the area in respect of which this sub-section requires an increase of population of not less than twenty-five per cent. ?

The Recorder held that the unit is the "ward or "district electoral division."

The King's Bench Division in *Rainey's case* (1) held that there must be an increase of not less than twenty-five per cent. of the population both in the "ward or "district electoral division" and in the "city or "town" of which the ward or district electoral division forms part.

The Recorder (dealing with the 1902 and 1923 Acts together) says, "the Statutes do not appear to specify "explicitly, viz., to what unit the twenty-five per "cent. increase was to be applied—to the population "of 'the city or town' or to that of 'the ward or "'district electoral division.'"

Megaw, J., on the other hand, in *Rainey's case* (1), at p. 19 says: "In my opinion what we have got to do "is to construe the wording of the 1923 Act in its "natural meaning. In my opinion there is no ambiguity "in it. The proviso, no doubt, refers to a ward or "district electoral division, but this proviso is subject "to the enactment contained in the earlier part of the "sub-section. It is a condition precedent to any new "licence being granted that there should be the "'growth or an extension of any city or town" shown "by an increase of population of twenty-five per cent."

What the Recorder cannot find specified explicitly in the first part of the sub-section Megaw, J., finds expressed without ambiguity. Which opinion is the correct one? As a matter of grammar I think the Recorder is right and that the sub-section does not specify the unit to which the twenty-five per cent. increase of population is to be applied.

If Parliament had intended this increase to apply to the whole city or town it would have been a simple matter to say so, e.g.:—"Where, owing to an increase "of not less than twenty-five per cent. of the population "of *any city or town* according to the last census."

There would then have been no doubt or ambiguity, but as the sub-section stands, the word *population* in the second line is used without grammatical reference to any area either local or general, and it is impossible to say to what area the increase of twenty-five per cent. is to apply until the proviso is looked at.

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No doubt, as the Recorder points out, if the first part of the sub-section stood alone "the population" would be taken to refer to the city or town but this would be by inference and not upon a strict construction of the language used.

I have dealt with the first part of the sub-section by itself and apart from the proviso because the King's Bench Division have construed this part of the sub-section as an unambiguous and positive enactment requiring a twenty-five per cent. increase of population over the whole city as a condition precedent to the granting of a new licence, a view which, in my opinion, cannot be supported. If the necessity for such increase in population over the whole city is not to be found in this part of the sub-section, it is not suggested that it can be found elsewhere, and consequently the prosecutor's case must succeed, but whether this view as to the construction of the first part of sub-section (*c*) be right or wrong, I have no doubt that the sub-section must be read as a whole, together with the proviso, in order to ascertain the intention of Parliament, and whatever may be said about the first part of the sub-section the proviso is free from all doubt or ambiguity.

The words "increase in population" are used in the proviso with specific reference to area and a licence can only be granted for premises situate in the ward or electoral division in which such increase in population has taken place.

The words "such increase in population" must have reference to some antecedent and can only refer to the "increase of twenty-five per cent. in the popula-"tion" in the first part of the sub-section, which according to the proviso must have taken place in the ward or district electoral division in which the premises are situate. These words further show that Parliament intended to prescribe one test only, namely, an increase in population in the ward or district electoral division.

If the first part of the sub-section is construed to require an increase of twenty-five per cent. in population over the whole city, the proviso shows that

Parliament must have contemplated the absurdity that this percentage increase would take place altogether in one ward or district electoral division. The King's Bench Division did not deal with this difficulty in *Rainey's case* (1), and neither judgment shows how the conclusion that the sub-section requires a double test was arrived at.

In the argument before us the difficulty was resolved by reading the words " such increase " in the proviso to mean " such percentage of increase " or some words to this effect, but this means redrafting the proviso to make it agree with the construction placed on the earlier part of the sub-section, and this is what the King's Bench Division have done in effect in *Rainey's case* (1) when they held that there must be an increase in population in the ward as well as in the whole city or town.

Reading the sub-section as a whole, I think Parliament only contemplated one test, namely, an increase of not less than twenty-five per cent. of the population in the ward in which the premises are situate, and that the proviso construes the earlier part of the sub-section which is not expressed in terms which make it necessary to reject any portion of the proviso or to construe it otherwise than according to its plain meaning.

It does not appear from the report of *Rainey's case* (1) how Brown, J., arrived at his conclusion that there must be an increase of twenty-five per cent. of the population over the city as a whole, but Megaw, J., says at p. 19, that: "The proviso, no doubt, refers to a ward or district " electoral division, but this proviso is subject to the " enactment contained in the earlier part of the " sub-section. It is a *condition precedent* to any new " licence being granted that there should be the " ' growth or an extension of any city or town ' shown " by an increase of population of twenty-five per cent."

I have some difficulty in following this. If the statute requires an increase of population of twenty-five per cent. over the whole city, proof of this increase is a condition precedent to obtaining a licence, but what we have to decide is whether the statute does so

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require, which is entirely a matter of construction and cannot be resolved otherwise than by an examination of the language used and of the subject matter with which the statute is dealing.

I do not think there can be any general rule of construction applicable to a case of this kind. Sometimes a proviso may have to yield to an earlier positive enactment, while in others the proviso may, as Lord Macnaghten said in *Local Government Board v. South Stoneham Union* (1), at page 62, "be a qualification of "the preceding enactment which is expressed in terms "too general to be quite accurate."

In all cases the whole enactment must be read to establish the connection between the earlier enactment and the proviso, and the statute construed, if possible, to give effect to both.

I can find nothing in the sub-section requiring an increase of population over the whole city, and reading the sub-section as it stands and not omitting the proviso, I think there is only one test required, namely, an increase of twenty-five per cent. in the population of the ward or district electoral division.

That the Minister of Home Affairs or his advisers took this view also is clear from the certificate given by him under the Act of 1927, but unless this certificate is in conformity with the Act of Parliament it is worthless and the Recorder would not be bound to act on it and it is of no assistance when the construction of the sub-section is challenged.

I now come to the consideration of the Act of 1902 which has been replaced by section 9 of the Northern Ireland Act of 1923—to see whether there is anything in the earlier Act which helps in the construction of sub-section (*c*) of section 9 of the Act of 1923.

Sub-section (*c*) reproduces section 4 together with the first definition in section 8 of the Act of 1902. Section 4 of the Act of 1902 was in its essentials similar to sub-section (*c*) of the Act of 1923, except that the words "of not less than twenty-five per cent. according "to the last census" do not appear in section 4, which ran as follows :—"Where, owing to increase in

(1) [1909] A.C. 57, 62.

" population, there is a growth or extension of any city " or town." And the section proceeded as in sub-section (*c*) including the proviso, with the unimportant variations that there was no provision giving residents or property owners a right to give evidence and the local area was the parish and not the ward or district electoral division and only one licence had to be extinguished. Under section 4, therefore, an increase in population was required, and there had to be a growth or extension of the city or town, and under the proviso the licence could only be granted in respect of premises situate in the parish in which such increase in population had taken place. The necessary percentage of increase in the population is not specified in section 4, but the first definition in section 8 provided that: " The " expression ' Increase in Population ' shall be taken " to mean an increase of not less than twenty-five per " cent. of the population according to the last census."

Under these two sections of the Act of 1902 the increase in population required was an increase in the parish in which the premises were situate and the percentage set out in the definition clause had reference to the parish alone and not to the city or town.

The point taken in the present case was never raised, so far as I am aware, under the Act of 1902, and if the draftsman had not run section 4 and the definition in section 8 of that Act into one in the Act of 1923, I doubt if it would ever have been taken under the latter Act.

As a matter of construction I do not think it makes any difference whether the reference to the twenty-five per cent. increase is to be found in the sub-section itself as in the Act of 1923 or in a separate section as in section 8 of the Act of 1902. Only one increase of twenty-five per cent. is contemplated in both statutes and that is an increase in the parish or ward. Any other construction would, in my opinion, stultify the Act and defeat the intention of the Legislature. The intention of Parliament is to be gathered from the statute itself, which prohibits the granting of new licences generally, excepting out of this general prohibition wards or district electoral divisions in which

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there has been an increase of population of not less than twenty-five per cent.

What is the object to be attained and the mischief to be avoided or remedied?

The Act was passed in the interests of the public—*R.* (*Wright*) *v. JJ. of Cork* (1)—and of the residents in the ward—*R.* (*Supple*) *v. JJ. of Clare* (2)—to insure that they shall have reasonable facilities for refreshment and that they shall not have to travel into the city for such refreshment, thereby causing overcrowding and other licensing difficulties outside their own ward. It assumes that if there is an increase in population of twenty-five per cent. existing facilities in the ward may not be sufficient but it provides that two licences in the city must be extinguished before a new licence can be obtained in a ward, doubtless on the assumption that there are redundant licences in the city. The granting of every new licence in a ward is therefore in effect a reduction of one licence over the whole city—and one of the objects to be attained is the reduction of redundant licences in the city or town as a whole.

I can therefore understand why an increase in population should be required before a new licence can be granted in a ward, but I cannot understand why a similar increase should also be required in the whole city where licences are redundant and the legislature is attempting to reduce them, or why the provision of facilities for the ward should be dependent on an increase in population in other areas which are possibly very remote or in the city itself in which the necessary increase may be a practical impossibility. If such increase in the city or town is necessary, the provision of facilities in the ward and the reduction of licences in the city of Belfast will in practice be held up indefinitely even though the twenty-five per cent. increase of population in the ward is enormously increased.

In my opinion, Parliament never intended to impose this condition, which would defeat what I believe to be the object of the sub-section, and I do not think that

(1) [1906] 2 I.R. 349. (2) [1907] 2 I.R. 299.

the statute shows any such intention, or that we must so construe it.

The conditional order herein should be made absolute with costs.

Solicitors for the prosecutor : *Joseph Donnelly & Co.*
Solicitor for the objectors : *Samuel Henry.*

J. McC.

Lord Chief Justice in Lunacy, 1938.

## IN THE MATTER OF A., A PERSON OF UNSOUND MIND, DECEASED.

July 6; 14.

*Lunacy—Deceased Lunatic—Freehold Property of Deceased—Order of Court directing Sale by Committee—Necessity for concurrence of Heir-at-Law in Conveyance—Lunacy Regulation (Ireland) Act*, 1871 (34 & 35 *Vict., c.* 22), *sections* 51 *and* 63.

A., a lunatic, was, at the time of his death, beneficially entitled to certain freehold property, which, by order of the Court was directed to be sold by the committee by public auction upon and subject to such terms and conditions of sale as should be settled by the acting registrar in lunacy. The object of the sale was to enable claims and demands against the estate of the lunatic to be discharged.

Conditions of sale were duly settled in which, by condition 10 (*b*), the purchaser was bound to assume (*inter alia*) that the deceased in the events which had happened became entitled to the property under the terms of the will of one Thomas Lundy. Condition 12 referred to the order for sale and to the fact that the committee, being a person appointed by the Court, the only covenants for title to be given by him should be such as were implied by his conveying under order of the Court. By condition 17 the purchaser was bound to accept all statements and findings in any order of the Court and registrar's rulings as conclusive. There was no finding by either the Court or registrar as to the heir-at-law of the deceased.

The premises were duly sold by public auction and the sale confirmed by the registrar in lunacy, the entire purchase money being lodged in Court to the credit of the matter. By No. 5 of his requisitions the purchaser asked who was the heir-at-law of the deceased, and that such heir-at-law should join in the deed. To this the vendor replied by referring to conditions 10 (*b*), 12 and 17, mentioned above.

Section 51 of the Lunacy Regulation (Ireland) Act, 1871, provides that notwithstanding the death of a lunatic, the real and personal estate of such deceased lunatic shall continue under and in the control, custody and protection of the Lord Chancellor . . . until the Lord Chancellor . . . shall have by an order discharged the real and personal estate of the deceased lunatic from the custody and protection of the Court; and until such order . . . the Lord Chancellor . . . shall retain, possess, enjoy and exercise the same powers, control and authority over the real and personal estate of the deceased lunatic as he would and might have possessed, enjoyed and exercised over such real and personal estate if the said deceased lunatic had not died as aforesaid.

Section 63 empowers the Lord Chancellor to order a sale of the lunatic's land for the purpose of raising money to be applied as

therein mentioned; and the section concludes:—"And the committee of the estate may and shall in the name and on behalf of the "lunatic execute, make and do all such conveyances, deeds, transfers, and things relative to any such sale . . . as the Lord "Chancellor . . . shall order."

It was argued on behalf of the vendor that these two sections when read together conferred upon the committee power to execute a conveyance of land, sold under order of the Court, which belonged to the lunatic, even though such lunatic was deceased at the time that the order for sale was made.

*Held*, that section 51 does not widen, extend, or amend the power to execute the conveyance conferred upon the committee by section 63 and, consequently, that requisition No. 5 had not been sufficiently answered.

SUMMONS.

Application on the part of John Arnold Wilson.

1. That it might be declared that the objections of the said John Arnold Wilson to the title to the hereditaments comprised in a contract dated 17th December, 1937, for the sale of the freehold hereditaments situate at and known as 7 Osborne Terrace, Warrenpoint, in the County of Down, by Garnet W. Holt, the committee in this matter to the said John Arnold Wilson had not been sufficiently answered and that a good title to the said hereditaments had not been shown.

2. That the necessary steps might be taken for ascertaining the heir-at-law of the said A., deceased, and for procuring the concurrence of the said heir-at-law in the conveyance of the said property to the said John Arnold Wilson.

The material facts are fully set out in the judgment of Andrews, L.C.J.

*Johnson* for the purchaser:—

Section 51 of the Lunacy Regulation (Ireland) Act, 1871, provides that "notwithstanding the death of a "lunatic the real and personal estate of such deceased "lunatic shall continue under and in the control, "custody and protection of the Lord Chancellor . . . "until the Lord Chancellor . . . shall have by an "order discharged the real and personal estate of the "deceased lunatic from the custody and protection of "the Court; and until such order as aforesaid the

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"Lord Chancellor . . . shall retain, possess, enjoy "and exercise the same powers, control and authority "over the real and personal estate of the deceased "lunatic as he would and might have possessed, "enjoyed and exercised over such real and personal "estate if the said deceased lunatic had not died as "aforesaid."

Section 63 empowers the Lord Chancellor to order a sale of a lunatic's property for the purpose of raising money to be applied as therein mentioned and concludes as follows:—"And the committee of the estate may "and shall, in the name and on behalf of the lunatic, "execute make and do all such conveyances, deeds, "transfers, and things relative to any such sale, "mortgage, charge or other disposition as aforesaid, "and for effectuating this present provision as the "Lord Chancellor . . . shall order."

The power conferred upon the committee by the concluding part of section 63 does not apply to the present case as the committee cannot execute in the name of a person who is deceased at the time of such execution. The Act empowers the committee to do something which the lunatic himself might have done if he had not been a lunatic, but it cannot give the committee power to do something which the lunatic's death deprived him of the power of doing for himself. The purchaser is entitled to have the whole legal estate in the property conveyed to him, but in the present case the legal and equitable estate is vested in the heir-at-law and the heir-at-law is in no way bound by these proceedings. An order for sale by the Court only binds the equitable interest in the property and unless a statutory power be shown enabling the committee to convey the legal estate, the heir-at-law of the deceased must be ascertained in order that a proper conveyance may be made to the purchaser.

*McKean, K.C.*, for the committee of the deceased:—

Sections 51 and 63 of the Lunacy Regulation (Ireland) Act, 1871, must be read together. When these two sections are read together they confer upon the committee power to execute a conveyance of land,

sold under order of the Court, which belonged to the lunatic, even though such lunatic was deceased at the time that the order for sale was made.

The conveyance would be properly executed in the form " C. D., Committee of A., deceased."

Even though the lunatic is dead, until the matter is dismissed out of lunacy the committee has full power to convey any interest or estate which was vested in the lunatic.

*Johnson* (in reply) :—

Section 51 merely provides for the continuance of the powers of the Lord Chancellor after the death of the lunatic. It extends in no way the power given the committee by section 63 to execute a conveyance in the name of and on behalf of a lunatic.

On the death of the lunatic the committee is *functus officio.*

Andrews, L.C.J.

Andrews, L.C.J. : The point involved in this case is a short one, which admittedly depends entirely upon the true legal construction and effect of sections 51 and 63 of The Lunacy Regulation (Ireland) Act, 1871.

At the time of his death, which occurred on 12th August, 1936, the patient was beneficially entitled to certain freehold property situate in Warrenpoint, which, by order dated 30th September, 1937, was directed to be sold by the committee by public auction according to the usual course of the Court upon and subject to such terms and conditions of sale as should be settled by the acting registrar in lunacy. The object of the sale was to enable claims and demands against the estate of the patient to be discharged.

Conditions of sale were duly settled in which, by condition 10 (*b*), the purchaser was bound to assume (*inter alia*) that the patient in the events which had happened became entitled to the property under the terms of the will of one Thomas Lundy therein referred to.

The premises were duly sold by public auction on 17th December, 1937, to one John Arnold Wilson for the sum of £500, and the sale was duly confirmed by

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the registrar in lunacy on 20th December, 1937, the entire purchase money being lodged in Court to the credit of the matter.

By No. 5 of his requisitions, the purchaser asked who was the heir-at-law of the patient, and he required that such heir-at-law should join in the deed. To this the vendor replied by referring (*a*) to condition 10 (*b*) mentioned above ; (*b*) to condition 12, which referred to the order for sale of 30th September, 1937, and to the fact that the committee, being a person appointed by the Court, the only covenants for title to be given by him should be such as were implied by his conveying under an order of the Court ; and (*c*) to condition 17, under which the purchaser was bound to accept all statements and findings in any order of the Court and registrar's rulings as conclusive.

In regard to this last mentioned condition (No. 17), I may say that admittedly there has been no finding by either the Court or registrar as to the heir-at-law of the patient ; and in these circumstances the argument addressed to me by Mr. McKean on behalf of the committee was based entirely upon sections 51 and 63 of The Lunacy Regulation (Ireland) Act, 1871. By the former of these sections it is provided that, notwithstanding the death of a lunatic, the real and personal estate of such deceased lunatic shall continue under and in the control, custody and protection of the Lord Chancellor . . . until the Lord Chancellor . . . shall have by an order discharged the real and personal estate of the deceased lunatic from the custody and protection of the Court ; and until such order . . . the Lord Chancellor . . . shall retain, possess, enjoy, and exercise the same powers, control, and authority over the real and personal estate of the deceased lunatic as he would and might have possessed, enjoyed, and exercised over such real and personal estate if the said deceased lunatic had not died as aforesaid.

Section 63 empowers the Lord Chancellor to order a sale of the lunatic's land for the purpose of raising money to be applied as therein mentioned ; and the section concludes with the following words :—

"And the committee of the estate may and shall "in the name and on behalf of the lunatic execute, "make, and do all such conveyances, deeds, trans- "fers, and things relative to any such sale . . . "as the Lord Chancellor . . . shall order."

Mr. McKean contended that when these two sections are read together they confer upon the committee power to execute a conveyance of land, sold under the order of the Court, which belonged to the lunatic, even though such lunatic was deceased at the time that the order for sale was made.

In my clear opinion this argument cannot prevail. The committee of the estate has in fact no estate or interest in the property legal or equitable. It was the intention of the Legislature by section 51 merely to provide for the continuance of the powers of the Lord Chancellor notwithstanding the death of a lunatic. It does not widen, extend, or amend the power conferred upon the committee by section 63 to execute the conveyance, nor does it even refer to him. Such power is to execute "*in the name* and on behalf of the lunatic." In my opinion, Mr. Johnson's argument is unanswerable that this power cannot apply to the present case as the committee cannot execute in the name of a person who is deceased at the time of such execution. It is impossible for the committee in such circumstances to sign the name of the lunatic. He is empowered to do something which the lunatic might himself have done if he had not been a lunatic, but he cannot do something which the lunatic's death deprived him of the power of doing for himself. In truth, on the lunatic's death intestate the property passed to his heir, and a conveyance in the name and on behalf of a person whose interest had passed to his heir, A. B., could have no legal effect in conveying the property to a purchaser, C. D. The patient's heir-at-law, who has not yet been ascertained, is not in any sense a party to nor is he bound by these proceedings, though of course he cannot successfully challenge any orders lawfully made by the Court under its statutory jurisdiction.

Pressed with the difficulty of the committee executing

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the deed *in the name* of a deceased person, Mr. McKean suggested that the form which the execution would properly take would be the name of the committee himself, followed by the descriptive words " Committee " of A., deceased." This view is quite untenable, as it would have the double infirmity of being made by a person in whom no title to the property was vested and of being at variance with the express provision of the section.

For these reasons I declare that requisition No. 5 has not been sufficiently answered ; and I order and direct a reference to the registrar to ascertain the heir-at-law of the said A., deceased, whose concurrence in the conveyance to the purchaser will be necessary. I shall allow the costs of both vendor and purchaser out of the estate.

Solicitors for the applicant : *Fisher & Fisher.*
Solicitors for the committee : *Johnson & Rutherford.*

J. R.

## THE KING (KIERNAN) v. McGEOUGH (1).

C.A. 1938.

July 25, 29.

*Summary Jurisdiction—Jurisdiction—Offence committed in townland of C., in County of A.—In year* 1864 *certain townlands, including townland of C., belonging to County of A., annexed to Petty Sessions District of N., County of D.—Petty Sessions (Ireland) Act,* 1851 (14 *&* 15 *Vict., c.* 93), *sections* 1, 24—*Appeal made to Quarter Sessions for Division of N., and County of D.—Whether County Court Judge of D. entitled to hear appeals from N. Petty Sessions in respect of offences arising in that portion of N. Petty Sessions District situate in County of A.—Summary Jurisdiction and Criminal Justice Act (Northern Ireland),* 1935 (25 *&* 26 *Geo.* 5, *c.* 13), *section* 24 (3).

At N. Petty Sessions the defendant was convicted of the dangerous driving of a motor car at C., in the County of A. He was fined 40*s.* and costs and his driver's licence was suspended for six months. He served a notice of appeal against the conviction and order, to the Quarter Sessions to be held at N. for the division of N. and County of D.

In 1864 the townland of C., in the county of A., where the alleged offence was committed was annexed to the Petty Sessions District of N., under the provisions of section 1 of the Petty Sessions (Ireland) Act, 1851. Since that time appeals from convictions in cases arising in the townland of C. had always been heard at the Quarter Sessions held at N. for the division of N. and County of D.

Section 1 of the Petty Sessions (Ireland) Act, 1851, provided (*inter alia*) that whenever it should appear to the justices at Quarter Sessions that any of the petty sessions districts in any county required alteration they should proceed at the next quarter sessions which should be held for such county to revise the said districts subject to certain provisions.

One of these provisions was that they should divide such county into convenient petty sessions districts for the purposes of the Act, and should declare the several parishes or townlands of which each of such districts should consist; and in doing so it should be lawful for them with the concurrence of the justices of any adjoining county assembled at any like quarter sessions, or at any adjournment of the same, to include in any of such districts any townlands of such adjoining county, where it should be conducive to the public convenience, and where no part of such townlands should be at a greater distance than seven miles from the place where petty sessions should be held for the district to which same should be annexed.

Section 24 of the Petty Sessions (Ireland) Act, 1851, provides (*inter alia*) that in any case of summary jurisdiction, where such

(1) In the Court of Appeal before Andrews, L.C.J., and Brown, J.

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order shall be made by the justices as is therein mentioned, either party in cases of a civil nature, or the party against whom the order shall have been made in other cases, shall be entitled to appeal to the next quarter sessions to be held in the same division of the county.

Section 24 (3) (*a*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, provides that "The appeal "shall be made to the next court of quarter sessions having juris- "diction in the county, or if the county is divided, the division of "the county for which the court of summary jurisdiction acted."

At the hearing of the appeal before the County Court Judge of D., the complainant contended that the County Court Judge had no jurisdiction to hear the appeal.

The County Court Judge of D., however, held that the appeal was properly brought to the Quarter Sessions for the County of D., and division of N., but stated a case for the opinion of the King's Bench Division as to whether his decision was right.

*Held*, by the Court of Appeal (Andrews, L.C.J., and Brown, J.), that by section 24 (3) (*a*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, it was enacted that the appeal should be made to the next Court of Quarter Sessions having jurisdiction in the county for which the Court of Summary Jurisdiction acted, and that the Court of Summary Jurisdiction acted for the County of A. and that the appeal should have been made to the County Court Judge and Chairman of Quarter Sessions of A.

The question put by the County Court Judge was therefore answered in the negative.

THIS is a case stated by the County Court Judge and Chairman of Quarter Sessions of the County of Down sitting at Newry Quarter Sessions pursuant to the Summary Jurisdiction (Northern Ireland), Act 1935, for the opinion of the Court of Appeal in Northern Ireland, on the application, in writing, of William Martin, Crown Solicitor for County Down, acting on behalf of the complainant who is dissatisfied with the determination (hereinafter set forth) of the County Court Judge on the hearing of the above appeal, as being erroneous in point of law.

At Newry Petty Sessions held on the 16th day of June, 1937, the complainant who is a District Inspector of the Royal Ulster Constabulary, charged the defendant who resided at Carrickbracken, Camlough, in the County of Armagh, *inter alia*, that he, the defendant at Cross, Camlough, in the County of Armagh, in the Petty Sessions District of Newry and County

of Armagh, being the driver of a motor vehicle on the public highway did unlawfully drive the said motor vehicle in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the highway and the amount of traffic which was actually at the time or which might reasonably have been expected to be on said highway, against the form of the statute in such case made and provided.

The defendant was convicted of the said offence by the resident magistrate then sitting and a fine of 40*s.* with 3*s.* for costs was imposed and an order made that defendant's driving licence should be suspended for a period of six months from the date of said petty sessions.

On the 18th day of June, 1937, the defendant served a notice of appeal against the said conviction and order to the Quarter Sessions to be held at Newry for the Division of Newry and County of Down to be held on the 27th day of September, 1937, and entered into the usual recognizance to prosecute said appeal.

It was agreed that in or about the year 1864 the townland of Cross in the County of Armagh where the alleged offence was committed had been duly annexed to the Petty Sessions District of Newry under the provisions of section 1 of the Petty Sessions Ireland Act, 1851, and that since that time appeals from convictions in cases arising in the said townland of Cross have always been heard at the Quarter Sessions held at Newry for the Division of Newry and County of Down.

At the hearing of the appeal on the 1st day of October, 1937, the complainant contended that the County Court Judge for the County of Down, had not jurisdiction to hear the appeal on the following grounds :—

(*a*) That the offence was committed in the townland of Cross which is in the County of Armagh and that defendant resided in said County.

(*b*) That the Summons was headed " Petty Sessions District of Newry, County of Armagh," and that the order made therein is similarly headed.

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(c) That the notice served upon the complainant pursuant to the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, is also headed Petty Sessions District of Newry and County of Armagh, but the notice of appeal dated the 18th day of June, 1937, served by defendant upon complainant is to the Quarter Sessions for the Division of Newry and County of Down.

(d) That although the Justices under the Petty Sessions Act of 1851 had annexed to the Petty Sessions District of Newry certain townlands belonging to the County of Armagh of which the townland of Cross was one, the County Court Judge of Down could not since the Summary Jurisdiction Act of 1935 came into force, hear and determine appeals from the resident magistrate sitting at Newry Petty Sessions in respect of offences arising in that portion of the petty sessions district of Newry situate in the County of Armagh.

(e) That by section 24 (3) (*a*) of the said Summary Jurisdiction Act, 1935, it is enacted that the appeal shall be made to the next court of quarter sessions having jurisdiction in the county for which the court of summary jurisdiction acted and that in this summons the court of summary jurisdiction acted for the County of Armagh and that the appeal should have been made to the County Court Judge and Chairman of Quarter Sessions of Armagh.

The defendant contended that the appeal was properly brought to Newry Quarter Sessions and that the County Court Judge of Down had jurisdiction to hear the appeal.

Having heard Mr. William Martin, Crown Solicitor for County Down, on behalf of the complainant, and Mr. William Johnson, counsel on behalf of defendant, the County Court Judge of Down decided that he had jurisdiction to hear the appeal of the said John F. McGeough on the ground that the appeal was properly brought to the Quarter Sessions for the County of Down and Division of Newry.

The question for the Court is whether the County Court Judge of Down was right in so deciding.

*The Attorney-General* (*E. S. Murphy, K.C.*), and *J. Gerald Dougherty* for the complainant :—

The townland of Cross is geographically in county Armagh. This townland was annexed for certain purposes to the county of Down.

The question is whether the appeal should go to the County Court Judge of Armagh or to the County Court Judge of Down.

The townland of Cross remained geographically in the county of Armagh.

Section 1 of the Petty Sessions (Ireland) Act, 1851, provided for revision of existing districts where alteration was required. It was in this way that the townland of Cross was annexed to the county of Down.

We suggest that section 7 (4) is most material. Under this sub-section a justice having jurisdiction in the petty sessions district is given a like special jurisdiction in the townland of the adjoining county, "although he may not be a justice of the county to "which such townland belongs ; and any committal to "any gaol or bridewell of such last-mentioned county, "or any other magisterial act done by any such justice, "in any case in which the offence or cause of complaint "shall have arisen in such townland, shall have the "like force and effect as if such justice was also a "justice of such last mentioned county." This sub-section shows very clearly the limited character of the transfer. It emphasises that the townland still remains in County Armagh.

Section 24 (3) (*a*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, provides that "The appeal shall be made to the next Court of "quarter sessions having jurisdiction in the county, "or if the county is divided, the division of the county "for which the court of summary jurisdiction acted."

In the present case the court of summary jurisdiction was acting for the County of Armagh. This annexation was simply a matter of convenience.

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*W. Johnson*, for the defendant :—

The defendant appealed to the County Court Judge of Down. He appealed to the Court in the manner which has been the practice since 1864.

He carried out the practice which had been in force until the passing of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935.

In the year 1864 the townland of Cross, in the County of Armagh, was annexed to the Petty Sessions District of Newry under the provisions of section 1 of the Petty Sessions (Ireland) Act, 1851.

The word used is "annexation" a very strong expression.

The words "the same division of the county" in section 24 of the Petty Sessions (Ireland) Act, 1851, must mean "the division of the county for which the "court of summary jurisdiction acted."

These words "the division of the county for which the "court of summary jurisdiction acted" appear in section 24 (3) (*a*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. If, as is admitted, appeals under the Act of 1851 in cases in which the offence arose in the townland of Cross were taken to and heard by the County Court Judge of Down, they should likewise be taken to and heard by him under the similar words of section 24 (3) (*a*) of the Act of 1935.

Where there is an established practice very clear language is required to show that it was the intention of Parliament to alter such a practice which was never challenged over such a long period. Parliament must be taken to have known of the existing practice.

There is no reason why the Act of 1935 should be interpreted in any different way from the Act of 1851. The area of the County Court Judge's jurisdiction is the county. The only county for which the County Court Judge was acting was Down.

Under section 24 (3) (*a*) of the Act of 1935 the appeal goes to the County Court Judge of Down. The County Court Judge of Armagh has only jurisdiction for the County of Armagh.

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*The Attorney-General* (in reply):—

The words to be construed in the Act of 1935 are different from the words in the Act of 1851.

The length of time during which the practice has been observed has no bearing on the construction of section 24 (3) (*a*) of the Act of 1935. The words of this section are reasonably plain. The relevant words are "The appeal shall be made to the next court of "quarter sessions having jurisdiction in the county, "for which the court of summary jurisdiction acted."

We lay special stress on the words "for which the "court of summary jurisdiction acted."

*Cur. adv. vult.*

ANDREWS, L.C.J.

July 29.

ANDREWS, L.C.J., delivered the Judgment of the Court as follows:—

At Newry Petty Sessions, on 16th June, 1937, the defendant, who resides at Camlough, in the County of Armagh, was convicted that on 22nd May, 1937, at Cross, in the County of Armagh, he drove a motor car on the public highway in a manner which was dangerous to the public. He was fined 40*s.* and costs and his driver's licence was suspended for six months. On 18th June, 1937, the defendant served a notice of appeal against the conviction and order to the Quarter Sessions to be held at Newry, for the Division of Newry, and County of Down, to be held on 27th September, 1937.

It appears that in the year 1864 the townland of Cross, in the County of Armagh, where the alleged offence was committed, was duly annexed to the Petty Sessions District of Newry under the provisions of section 1 of The Petty Sessions (Ireland) Act, 1851; and it is admitted that since that time appeals from convictions in cases arising in the said townland of Cross have always been heard at the Quarter Sessions held at Newry, for the Division of Newry, and County of Down.

On the hearing of the appeal before the County Court Judge of Down the complainant contended that the learned judge had no jurisdiction to hear the appeal. This view was, however, rejected, the Court holding

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that the appeal was properly brought to the Quarter Sessions for the County of Down and Division of Newry ; and the question for this Court is whether the learned judge was right in so deciding.

Section 1 of the Petty Sessions (Ireland) Act, 1851, provides (*inter alia*) that whenever it shall appear to the justices at quarter sessions that any of the petty sessions districts in any county require alteration they shall proceed at the next quarter sessions which shall be held for such county to revise the said districts subject to certain provisions, of which the material one is as follows, viz.: they shall divide such county into convenient petty sessions districts for the purposes of the Act, and shall declare the several parishes or townlands of which each of such districts shall consist ; and in doing so it shall be lawful for them with the concurrence of the justices of any adjoining county assembled at any like quarter sessions to include in any of such districts any townlands of such adjoining county, where it shall be conducive to the public convenience, and where no part of such townlands shall be at a greater distance than seven miles from the place where petty sessions shall be held for the district to which same shall be annexed.

Under this section it is clear that revision of a petty sessions district in manner provided is effected for purposes of public convenience only. No change, however, is made in the geographical boundaries of the counties concerned. The townland of Cross, though included in or annexed to the Petty Sessions District of Newry, remained for every other purpose part of the County of Armagh.

The limited character of the transfer is, if possible, made still more clear by section 7 (4) of the Act, under which a justice having jurisdiction in the petty sessions district is given a like special jurisdiction in the townland of the adjoining county annexed to his district " although he may not be a justice of the county to " which such townland belongs " ; and committal in any case in which the offence or cause of complaint shall have arisen in such townland is under the section made to a gaol or bridewell in the county in which such townland is situate.

The appeal section under the Act of 1851 is section 24. It provides (so far as is material) that where such an order shall be made by the justices as is therein mentioned, either party in cases of a civil nature, or the party against whom the order shall have been made in other cases, shall be entitled to appeal to the next quarter sessions to be held in the same division of the county. Now what is the meaning of the words "*same* division of the county"? "Same" as what? Mr. Johnson for the defendant contends that it must mean "the division of the county for "which the court of summary jurisdiction acted," borrowing these words from the appeal section—section 24 (3) (*a*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, under which the appeal in the present case was brought. His argument on this assumption simply is that if, as is admitted, appeals under the Act of 1851 in cases in which the offence arose in the townland of Cross were formerly taken to and heard by the County Court Judge of Down, they should likewise be taken to and heard by him under the similar words of section 24 (3) (*a*) of the Act of 1935. The fallacy of this argument lies in my opinion in the meaning so assigned to the word "same." In section 24 of the Act of 1851 the words "for which the court of summary jurisdiction "acted" are nowhere to be found; and I therefore find it impossible as a matter of legal construction to interpret the word "same" in this manner. What I do find, however, in two places in section 24 of the Act of 1851 before the use of the word "same" are references to "where an order shall be made by the "justices" and "the party against whom the order "shall have been made"; and I have therefore no doubt that the legislature in the use of the words "same division" was referring to the division *where* the order was made by the justices. Accordingly under that section, as orders in cases arising in Cross were made in Newry, appeals lay to quarter sessions in Newry.

What the policy of the legislature may have been in effecting a change in this respect under the Act of 1935 I do not know, but change there undoubtedly was.

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Appeals are no longer to be taken to quarter sessions of the division *where* the justices order was made, but to quarter sessions having jurisdiction in the county or in the division of the county *for which the court of summary jurisdiction acted.* In my clear opinion the court of summary jurisdiction which heard this case was then acting for the County of Armagh, in whose area the offence is alleged to have been committed and to whose gaol the defendant would be committed in default of payment of the fine imposed upon him.

The question submitted to us must, accordingly, be answered in the negative.

The mistake which we hold to have been made in the service of the notice of appeal was in the circumstances a very natural one, and it is unfortunate that it has deprived the defendant of his right to have his appeal heard. We would respectfully suggest to the learned Attorney-General in all the circumstances of the case that the hardship might reasonably be mitigated in a measure by neither fine nor costs being levied.

Solicitor for the complainant : *Chief Crown Solicitor.*
Solicitors for the defendant : *Fisher & Fisher.*

J. McC.

[EDITOR. In pursuance of this suggestion His Grace, the Governor, was pleased to order that both fine and costs be remitted.]

## THE KING (KENNY) v. HUGHES (1).

K.B.D. 1938.

April 21.

*Motor Vehicles—Speed offences—Previous convictions—Convicted on six previous occasions—A period of less than twelve months between sixth and seventh convictions and of more than twelve months between the fifth and sixth convictions—Motor Vehicles (Traffic and Regulation) Act (Northern Ireland)*, 1926 (16 & 17 *Geo.* 5, *c.* 31) *sections* 6 (2), 4 (1) (*i*)—*Whether last conviction should be treated as a second conviction or whether all previous convictions should be taken into account—Motor Vehicles and Road Traffic Act (Northern Ireland)* 1929 (20 *Geo.* 5, *c.* 21) *section* 1 (1)—*Motor Vehicles and Road Traffic Act (Northern Ireland)* 1934 (24 & 25 *Geo.* 5, *c.* 15) *section* 3 (1).

The defendant was charged at petty sessions with having driven a motor goods vehicle on the public highway at a speed of 32 miles per hour, the maximum speed laid down for such vehicle being twenty miles per hour; contrary to Motor Vehicles and Road Traffic Acts (Northern Ireland), 1926 to 1934, and regulations made thereunder.

The resident magistrate convicted the defendant, and ordered that he be fined the sum of £5 and the sum of six shillings for costs and in default of payment be imprisoned for two months without hard labour unless such sums be sooner paid. His driving licence was suspended for six months and his conviction was to be recorded on the licence.

The defendant appealed to quarter sessions. At the hearing at quarter sessions the defendant admitted the offence charged and and also admitted the following previous convictions for similar offences at C. petty sessions on 1st November, 1937; at same petty sessions on 5th October, 1936, at D. petty sessions on 14th September, 1936, at P. petty sessions on 9th March, 1936, at M. petty sessions on 27th November, 1935, and at L. petty sessions on 10th November, 1932.

The County Court Judge of A. decided that the conviction in the present case was a second conviction within the meaning of section 6 (2) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and that the provisions of paragraph (i) of the proviso to sub-section (1) of section 4 of that Act did not apply.

He, therefore, varied the decision of the resident magistrate and imposed the minimum penalty of £2 and removed the suspension from the defendant's licence, but stated a case for the opinion

(1) In the King's Bench Division before Andrews. L.C.J., and Brown, J.

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**of the King's Bench Division as to whether he was right in so deciding.**

*Held*, by the King's Bench Division (Andrews, L.C.J., and Brown, J.) that as a period of twelve months had not elapsed since defendant's last previous conviction for a speed offence, all previous convictions should be taken into account for the purpose of determining the penalty for the offence in respect of which the appeal was brought, and that consequently the defendant was not entitled to the benefit of the provisions set out in section 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1929, and that the resident magistrate was right in deciding as he did.

**The question put to the Court was consequently answered in the negative.**

CASE STATED by the County Court Judge and Chairman of Quarter Sessions for the County of Armagh as follows :—

This is a case stated by George C. Green, County Court Judge and Chairman of Quarter Sessions for the County of Armagh, Division of Lurgan, on the application in writing of the complainant who is dissatisfied with his determination on the hearing of the above appeal, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland on the question of law hereinafter set forth.

On the 22nd day of November, 1937, the defendant appeared before the resident magistrate at Portadown Petty Sessions to answer a complaint as follows :—

" WHEREAS a complaint has been made to me that " on the 15th day of October, 1937, between Drum- " alis and Drumgoose in said district and county, " you the said defendant did drive a motor vehicle, " to wit, a goods vehicle, on the public highway at " a speed of 32 miles per hour, the maximum speed " laid down for such motor vehicle being 20 miles per " hour ; contrary to the Motor Vehicles and Road " Traffic Acts (Northern Ireland) 1926 to 1934 and " regulations made thereunder."

The resident magistrate convicted the defendant and made an order in the following terms : " Defendant is " convicted of said offence and ordered to pay for fine " the sum of £5 and for costs the sum of 6/- and in " default of payment to be imprisoned in Belfast Gaol " for the period of two months without hard labour

"unless said sums be sooner paid. Warrant not to "issue for seven clear days—One shilling to be added "to costs if warrant issues. Driving licence suspended "for six months. Conviction to be recorded on "licence,"

The defendant lodged an appeal against the above decision which was heard before the County Court Judge at Lurgan Quarter Sessions on the 19th day of January, 1938, and his decision was pronounced at Armagh Quarter Sessions on the 26th day of January, 1938.

The defendant admitted before the said County Court Judge the offence charged in the said summons and also admitted the following previous convictions for similar offences, that is to say—at Clonmacate Petty Sessions on 1st November, 1937 ; at same Petty Sessions on 5th October, 1936 ; at Dungannon Petty Sessions on 14th September, 1936 ; at Portadown Petty Sessions on 9th March, 1936 ; at Moira Petty Sessions on 27th November, 1935, and at Lisburn Petty Sessions on 10th November, 1932.

Mr. Best, Crown Solicitor, for the complainant submitted that as a period of 12 months had not elapsed since the defendant's last previous conviction on 1st November, 1937, for a speed offence, all previous convictions of the said defendant for such offence should be taken into account for the purpose of determining the penalty for the offence in respect of which the present appeal was brought, and that consequently the defendant was not entitled to the benefit of the provision set out in section 1 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1929, and that the resident magistrate was therefore correct in treating the conviction pronounced by him as a third or subsequent conviction for the purpose of determining the penalty under section 6 (2) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and in imposing a penalty of £5 in respect thereof and in holding that he was bound to suspend the defendant's licence under proviso (i) to section 4 (1) of said Act as amended by section 3 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934.

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Mr. Curran, Barrister-at-Law (instructed by Mr. A. P. Orr), who appeared for the defendant, submitted :

(*a*) That the said conviction of the 1st day of November, 1937, was a first conviction within the meaning of section 6 (2) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and was properly imposed as such by the resident magistrate.

(*b*) That the defendant had not been convicted of any offence since the said 1st day of November, 1937, until he was convicted in the present case ; and accordingly that the present conviction was a second conviction within the meaning of the said section 6 (2) of the said Act.

(*c*) That the provisions of paragraph (i) of the proviso to sub-section (1) of section 4 of the said Act did not apply to the present case.

(*d*) That more than 12 months having elapsed between the defendant's then last previous conviction and the said conviction of the 1st day of November, 1937, no conviction prior to the said conviction of the 1st day of November, 1937, could be taken into account for the purpose of determining the penalty or in connection with the suspension of the defendant's licence in the present case by virtue of the provisions of section 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1929.

(*e*) That the interpretation of the said last mentioned section contended for by the complainant was inconsistent with the provisions of section 4 (3) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and with the spirit and intention of the said Acts.

The County Court Judge was of the opinion that Mr. Curran's contentions were correct, and decided that the conviction in the present case was a second conviction within the meaning of section 6 (2) of the said Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and that the provisions of paragraph (i) of the proviso to subsection (1) of section 4 of the said Act do not apply.

The County Court Judge accordingly varied the decision of the resident magistrate and imposed the minimum penalty of £2 for a second conviction and removed the suspension from the defendant's licence.

The question for the Court is whether the County Court Judge was right in so deciding. If the Court shall be of the opinion in the affirmative, then the said order of Quarter Sessions is to be affirmed ; if in the negative, then the said order of Quarter Sessions is to be discharged, and the order of the resident magistrate affirmed or to be otherwise dealt with as to the said Court may seem fit.

*The Attorney-General* (*E. S. Murphy, K.C.*) and *J. Gerald Dougherty*, for the prosecutor :—

The wording of the section is perfectly plain. The resident magistrate was bound to look at the defendant's previous record.

As a period of twelve months had not elapsed since defendant's last previous conviction on 1st November, 1937, all previous convictions must be taken into account. Consequently the defendant was not entitled to the benefit of the provision in section 1 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1929. The resident magistrate was correct in treating the conviction as a third or subsequent conviction for the purpose of determining the penalty under section 6 (2) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and imposing a penalty of £5 and in holding that he was bound to suspend the defendant's licence under section 4 (1) (i) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and in imposing a penalty of £5 and in holding that he was bound to suspend the defendant's licence under 4 (1) (i) of that Act as amended by section 3 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934.

*Black, K.C.*, and *Curran*, for the defendant. The Court must have regard to the defendant's record for the previous twelve months.

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We rely upon section 1 (1) of the Act of 1929. If a period of twelve months had elapsed since the last previous conviction, no previous convictions can be taken into account for the purpose of determining the penalty.

We rely upon the *King v. South Shields Licensing Justices* (1) and especially on the words used by Lord Alverstone in his judgment at page 8.

The reasonable construction of section 1 (1) of the Act of 1929 is that after a period of twelve months since last previous conviction the record is expunged and that this is a second and not a third conviction. After a year free from convictions, there was to be a fresh start.

The Court should struggle to construe the Act so as not to arrive at an absurd conclusion. The argument on behalf of the defendant would lead to a sensible and harmonious result.

The conviction of the 1st November, 1937, was a first conviction within the meaning of section 6 (2) of the Act of 1926. The defendant was not convicted of any offence from 1st November until he was convicted in the present case and we maintain that the present conviction is a second conviction within the meaning of section 6 (2) of that Act. The provisions of 4 (1) (i) of the Act of 1926 do not apply to the present case.

*The Attorney-General* (in reply):—The relevant section is a clear enactment which entirely justifies the resident magistrate's decision. There is no absurdity in that decision. There is nothing absurd or ridiculous in the legislature saying in effect where a person is convicted twice within a short period, all previous convictions must be taken into account.

[He also referred to *Campbell v. Strachan* (2).]

ANDREWS, L.C.J.

ANDREWS, L.C.J.: The facts of this case fall within a narrow compass. On 22nd November, 1937, the defendant was convicted at Portadown Petty Sessions on a summons charging him with driving a goods

(1) [1911] 2 K. B. 1, 8. (2) [1927] N.I. 226.

vehicle on the public highway at a speed of 32 miles per hour, the maximum speed for such vehicle being 20 miles per hour. He was fined the sum of £5, and was ordered in default of payment to be imprisoned for two months. The resident magistrate further suspended the defendant's driving licence for six months, and ordered the conviction to be recorded on the licence.

On the hearing of an appeal before the County Court Judge of Armagh the defendant admitted the offence with which he was charged, and also admitted six previous convictions for similar offences on the following dates :—1st November, 1937, 5th October, 1936, 14th September, 1936, 9th March, 1936, 27th November, 1935, 10th November, 1932. The sole question in issue was whether in the circumstances the resident magistrate was right in treating the conviction pronounced by him as a third or subsequent conviction for the purpose of determining the penalty, and in holding that he was accordingly bound to suspend the defendant's licence under proviso (i) to section 4 (1) of the Motor Vehicles (Traffic and Regulations) Act (Northern Ireland), 1926, as amended by section 3 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, or whether it ought to be treated as a first, or, alternatively, as a second conviction within the Act of 1926.

Section 4 (1) of the Act of 1926 provides for the suspension of licences, the disqualification for obtaining a licence, and endorsement of conviction thereon without prejudice to the infliction of any other penalty. Proviso (i) to that section provides, so far as is material for the purposes of this case, that "in the case of a "second or subsequent conviction for an offence under "sub-section (1) of section one of this Act, and in the "case of a third or subsequent conviction for exceeding "a speed limit . . . the court shall suspend for a "period of not less than three months the licence under "this part of this Act, if any, held by the person con-"victed."

Speed offences, with appropriate punishment for first, second, and third or subsequent convictions, are dealt with in section 6 (1) of the same Act.

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ANDREWS, L.C.J.

There can be no doubt that under this Act, if it stood alone, the offence for which the defendant was convicted on 22nd November, 1937, would necessarily be regarded as a third or subsequent offence properly punishable with suspension of the defendant's driving licence.

The defendant, however, relies on section 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1929, by which it is provided that "where a "person is convicted of a speed offence under the Motor "Vehicles (Traffic and Regulation) Act (Northern "Ireland), 1926, no previous convictions of that per- "son for a speed offence shall be taken into account for "the purpose of determining the penalty for the first- "mentioned offence, or in connection with the suspen- "sion of the licence of that person for the first men- "tioned offence, if a period of twelve months or more "has elapsed since his last such previous conviction; "and paragraph (i) of the proviso to sub-section (1) of "section 4, and sub-section 2 of section 6, of the prin- "cipal Act shall be subject to the provisions of this "section."

It is submitted on the defendant's behalf that as a period of twelve months or more had elapsed between the defendant's convictions of 5th October, 1936, and 1st November, 1937, the defendant was entitled under this section to make, as it were, a fresh start, and that the conviction of 22nd November, 1937, ought, therefore, to be treated as merely his second conviction. In my opinion this submission cannot be sustained. There are no words in the section to justify it. The only period referred to in the section is the "period of "twelve months or more since his (the convicted "person's) last such previous conviction." There is in my judgment no ambiguity or doubt as to the meaning of the words "last such previous conviction." They mean the last conviction for a speed offence previous to the conviction in the case then before the Court. It is to the immediate, and not to the more remote past, that the Court must look under the section when imposing the appropriate sentence. The intervals between earlier convictions are immaterial.

Now in the present case the defendant's last such previous conviction prior to 22nd November, 1937, was on 1st November, 1937, i.e., within the period of twelve months. Accordingly, section 1 (1) of the Act of 1929 does not apply. The conviction was in fact on the evidence the defendant's seventh conviction for speed offences. The resident magistrate was, in my opinion, right in the conclusion at which he arrived. The question put to us by the learned County Court Judge must, accordingly, be answered in the negative.

BROWN, J. concurred.



Solicitor for the prosecutor: *J. Patterson Best.*

Solicitors for the defendant: *Simmons, Meglaughlin & Orr.*

J. McC.

K.B.D.
1938.

April 21.

## THE KING (MULHERN) v. THE RECORDER OF LONDONDERRY (1).

*Licensing Law—Intoxicating Liquor and Licensing Act (Northern Ireland) 1927 (17 & 18 Geo. 5, c. 21) section 3 (4)—Tenancy in licensed premises determined—Licence "extinguished or surrendered"—Premises in vicinity of the premises to which extinguished licence had been attached—Licensing (Ireland) Act 1902 (2 Edw. 7, c. 18) section 3—Town Tenants (Ireland) Act, 1906 (6 Edw. 7, c. 54) section 5.*

A limited company was quarterly tenant to the L. Corporation of certain licensed premises. In respect of these premises the company held an ordinary licence to sell beer, cider and spirits by retail. The tenancy was determined by notice to quit and expired on 15th May, 1937. By reason of the expiration of the tenancy the licence held in connection with the premises was extinguished.

The applicant applied for an ordinary licence to sell beer, cider, and spirits by retail in premises in the vicinity of the premises to which the licence so extinguished was attached.

The limited company had abandoned any claim which they might have had under section 5 of the Town Tenants (Ireland) Act, 1906, to compensation for loss of goodwill in respect of the tenancy of the premises to which the licence so extinguished was attached.

The applicant had never had any interest in the tenancy of the premises which had been determined and had no possible claim under the Town Tenants (Ireland) Act, 1906, for loss of goodwill in respect of those premises.

Objection was taken to the granting of the licence on the grounds (inter alia) that on the true construction of section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, a licence in respect of premises in the vicinity of the premises to which the extinguished licence had been attached could be granted only to the person who had been tenant of such premises and had held the extinguished licence.

The Recorder of L. held that as a matter of law under section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland) 1927, a licence could be granted only to the person who had been tenant or licensee of the premises to which the extinguished licence had been attached and that he was bound in law to refuse the application for the licence.

(1) In the King's Bench Division before Andrews, L.C.J., and Brown, J.

**A conditional order for a writ of certiorari was granted by the Lord Chief Justice on the ground that the order of the Recorder was erroneous in point of law.**

**Cause having been shown the matter came before the King's Bench Division consisting of Andrews, L.C.J., and Brown J., who held that it was not necessary that the applicant for a licence under section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, should have been tenant of the premises to which the extinguished licence had been attached or that he should have held the extinguished licence.**

**The cause shown was therefore disallowed.**

CERTIORARI.

By a notice of application dated 8th December, 1937, the applicant Vincent Mulhern gave notice of his intention to apply at the next General Quarter Sessions of the Peace to be held at Londonderry for the County of the City of Londonderry on 6th January, 1938, for a certificate to entitle him to receive an ordinary licence to sell beer, cider and spirits by retail at his house situate at 35, Strand Road, Londonderry.

The application was heard by the Recorder of Londonderry on 7th January, 1938.

Under an agreement in writing dated 18th February, 1931, and made between the Londonderry Corporation and Andrew A. Watt & Co., Ltd., the company held as quarterly tenant the premises 54 and 56 Strand Road, Londonderry, known as the Neptune Bar, at the yearly rent of £32.

In respect of these premises, the company held an ordinary licence to sell beer, cider and spirits by retail.

The tenancy created by this agreement was duly determined by a notice to quit served by the Londonderry Corporation and the tenancy accordingly expired on 15th May, 1937.

By reason of the expiration of this tenancy the licence held in connection with the premises 54 and 56 Strand Road, Londonderry, was extinguished.

The premises 35 Strand Road, Londonderry, were in the vicinity of the premises 54 and 56 Strand Road Londonderry, to which the extinguished licence was attached, and the premises 35 Strand Road, Londonderry, were suitable premises for such a licence as was applied for.

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Andrew A. Watt & Co., Ltd., had abandoned any claim which they might have had under section 5 of the Town Tenants (Ireland) Act, 1906, or any subsequent enactment, to compensation for the loss of goodwill in respect of the tenancy of the premises to which the extinguished licence was attached.

The applicant had never had any interest in the tenancy under which Andrew A. Watt & Co., Ltd., held the premises 54 and 56 Strand Road, Londonderry, and had no possible claim under the Town Tenants (Ireland) Act, 1906, or any subsequent enactment, to compensation for the loss of goodwill in respect of the premises.

At the hearing of the application, J. J. Dobbin, District Inspector, R.U.C., appeared and objected to the granting of the licence on the grounds (inter alia) that on the true construction of section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, a licence in respect of premises in the vicinity of the premises to which the extinguished licence had been attached, could be granted only to the person who had been tenant of such premises and had held the extinguished licence.

It was contended on behalf of the prosecutor that it was not necessary that the applicant for a licence under section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, should have been tenant of the premises to which the extinguished licence was attached or that he should have held the extinguished licence.

The Recorder of Londonderry held as a matter of law that under section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, a licence could be granted only to the person who had been tenant or licensee of the premises to which the extinguished licence had been attached, and he refused the application.

The prosecutor obtained a conditional order from the Lord Chief Justice for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the Recorder of Londonderry.

Cause having been shown, the prosecutor applied to have the conditional order made absolute.

*The Attorney-General* (*E. S. Murphy, K.C.*) and *J. G. Dougherty* for the District Inspector of the Royal Ulster Constabulary for the County of the City of Londonderry showed cause against the order :—

The point is a very narrow one and very important.

We submit that a person who has no interest in the surrendered licence cannot because he has premises in the vicinity, apply for and receive a publican's licence.

We submit that the Court has now to construe this sub-section in the Act of 1927, not the section in the Act of 1902 which was construed in *The King* (*Rigg*) *v. Tipperary Justices* (1), *The King* (*Supple*) *v. Justices of Clare* (2), and *The King* (*Wright*) *v. Justices of Cork* (3).

The legislature considered that a new licence should only be granted to someone who had an interest in the old licence.

The present case should not be governed by dicta dealing with cases that arose under the Licensing (Ireland) Act, 1902.

The net question is, how is section 3 (4) of the Act of 1927 to be construed ? The object of this legislation was that there should be no increase in licences.

We submit that the Recorder was right in holding that under section 3 (4) of the Act of 1927, a licence could be granted only to the person who had been tenant or licensee of the premises to which the extinguished licence had been attached.

*Black, K.C.* and *M'Veigh* for the prosecutor Mulhern.

The Act of 1902 had exactly the same object as the Act of 1923, that object being to fetter the increase of licences. The general policy of the two Acts was similar. The legislature had the same object in the Act of 1927 as they had in the Act of 1902.

Section 3 (4) of the Act of 1927 was passed to meet the convenience of the public, not for the benefit of the existing tenant.

(1) 41 I.L.T.R. 152. (2) [1907] 2 I.R. 299.
(3) [1906] 2 I.R. 349.

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We rely on the words used by Madden, J., in his judgment in *The King* (*Supple*) *v. Justices of Clare* (1). That was a case under the Act of 1902. In his judgment Madden, J., said: "The exception in the third "section was passed in the interests of the locality. "The mischief against which it was directed was the "loss to a vicinity of a public house to which it was "fairly entitled, by reason of the landlord neglecting "or refusing to apply for a new licence on the expira- "tion of a lease."

Similar words were used by Wright, J., in the same case.

We also rely on the words used by Sir S. Walker, L.C., in *The King* (*Rigg*) *v. Tipperary Justices* (2) where he said in his judgment: "The Licensing (Ireland) Act, "1902, was not passed to benefit former tenants of "licensed premises."

Holmes, L.J., used similar words when he said in his judgment: "This enactment (Licensing (Ireland) Act, "1902) was designed to meet the convenience of the "public, and any person in the occupation of neigh- "bouring premises might avail himself of its provisions "for the purpose of applying for a licence."

We submit that the intention of the legislature has not been altered by the Acts of 1923 and 1927.

The sub-section dealing with the Town Tenants (Ireland) Act, 1906, was passed to prevent injustice. There is nothing to show that the provision in section 3 (4) of the Act of 1927 was only for the benefit of the tenant or licensee. The proviso to that sub-section is expressed in a purely negative form.

The Act of 1902 was intended to operate in a certain way, there is nothing to show that the Acts of 1923 and 1927 were intended to operate in any different way.

They also referred to *The King* (*Wright*) *v. Justices of Cork* (3).

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This case comes before us without any direct governing authority. In order to arrive at

(1) [1907] 2 I.R. 299, 305, 307

(2) 41 I.L.T.R. 152, 155.

(3) [1906] 2 I.R. 349.

the proper construction of section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, it is necessary to review the legislation from the Licensing Act of 1902 and to consider the policy which the legislature had in view.

The object of the Licensing Act, 1902, was to combat the evil of undue multiplicity of licences. It was felt that a general prohibition against the granting of new licences might cause considerable hardship in certain cases, and the prohibition was, accordingly, made subject to express exceptions. One of these exceptions is contained in section 3 of that Act, by which it was provided that " where by reason of the expiration of a " lease, a licence for the sale of intoxicating liquors for " consumption on the premises comprised in the lease " is extinguished or surrendered, the licensing authority " may, notwithstanding anything in this Act, grant a " licence for suitable premises in the immediate vicin- " ity of the premises to which the licence so extin- " guished or surrendered was attached."

This section provided no restriction whatever on the person who should make the application for the licence. He might be either the former tenant or any other member of the public. The section has been frequently considered by the Courts in such cases as *The King* (*Rigg*) *v. Tipperary Justices* (1), *The King* (*Supple*) *v. Justices of Clare* (2), and *The King* (*Wright*) *v. Justices of Cork* (3), which, I understand, were not cited to the learned Recorder. Certain statements of law made by the learned judges in these cases have been described in argument as mere dicta. In my opinion, however, it is quite clear from these dicta that section 3 of the Licensing Act, 1902, was not passed merely for the benefit of the tenant who had been dispossessed, but also in the supposed interests of the public ; and I have no doubt whatever that both by reason of this principle, and also more particularly because of the language of the section, the case now presented on behalf of the Crown would have been unarguable if it had arisen on the Licensing Act, 1902.

(1) 41 I.L.T.R. 152.
(2) [1907] 2 I.R. 299.
(3) [1906] 2 I.R. 349.

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The question which, accordingly, arises for determination is how far, if at all, this policy of the legislature has been modified by the Acts of 1923 and 1927.

Section 5 of the Town Tenants (Ireland) Act, 1906, provided for the payment of compensation to a tenant for loss of goodwill where the landlord without good and sufficient cause terminates or refuses to grant a renewal of the tenancy. In these circumstances it was felt by the legislature that it would be unreasonable that a tenant who was entitled to compensation for loss of goodwill should also be entitled to a licence for suitable premises in the immediate vicinity of the premises formerly held by him. This was the sole matter to be guarded against, and it was effected in the first instance by section 9 (*b*) of the Intoxicating Liquor Act (Northern Ireland), 1923, which, after re-enacting section 3 of the Act of 1902 in for all material purposes identical terms, contained a proviso "that no such "licence shall be granted to any person who is entitled "under section 5 of the Town Tenants (Ireland) Act, "1906, to compensation for the loss of goodwill in "respect of a tenancy of the premises to which the "licence so extinguished or surrendered was attached."

It will be observed that under the terms of this proviso the mere existence of a right to claim compensation on the part of a dispossessed tenant was a complete bar to the granting of a licence to him. Further than that it did not go. It did not either expressly or impliedly restrict or limit the granting of licences to any other person.

It was considered by the legislature that this proviso pressed somewhat harshly against tenants, and it was to remedy such hardship that section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, substituted the following paragraph for paragraph (*b*) of section 9 of the Act of 1923 :—

> "(*b*) Where by reason of the expiration of a lease, a retailer's on-licence or a retailer's off-licence in respect of premises comprised in the lease is extinguished or surrendered, the licensing authority may, notwithstanding anything in this section, grant a licence for suitable premises in

the vicinity of the premises to which the licence so extinguished or surrendered was attached:

Provided that no such licence shall be granted to any person unless he has abandoned any claim which he may have, under section 5 of the Town Tenants (Ireland) Act, 1906, or any subsequent enactment, to compensation for the loss of goodwill in respect of a tenancy of the premises to which the licence so extinguished or surrendered was attached."

It will be observed that the main enacting portion of the section is in practically identical terms with the corresponding sections of the earlier Acts, and the modified proviso merely conferred upon the dispossessed tenant the right of election to abandon his claim under the Town Tenants Act, and, when he so elected, the bar to his application was removed. I am clearly of opinion that in thus favouring the dispossessed tenant the legislature never intended to take away the right conferred upon other persons by the Act of 1902, and preserved to them by the main enacting words of section 3 (4) of the Act of 1927. This could only have been effected by clear and direct legislation.

In my opinion, therefore, the argument presented by the Attorney General must fail.

We, accordingly, disallow the cause shown and make absolute the conditional order with costs.

BROWN, J.: I agree and have nothing to add. BROWN, J.

Solicitors for the prosecutor: *Tracy & Logue.*

Solicitor for the District Inspector Royal Ulster Constabulary for City of Londonderry: *Chief Crown Solicitor.*

J. McC.

K.B.D. 1938.

June 10, 17, 23. July 26.

## CRILLY v. COUNTY COUNCIL OF LONDONDERRY AND COUNTY COUNCIL OF TYRONE (1).

*Criminal Injury—Decree awarding compensation—Writ of Certiorari—Injuries committed within one mile of boundary of neighbouring county—Apportionment—Grand Jury (Ireland) Act,* 1836 (6 *&* 7 *Wm,* 4, *c.* 116) *section* 140—*Power of one County to bring in neighbouring County—Local Government (Ireland) Act,* 1898 (61 *&* 62 *Vict., c.* 37) *section* 5 (2)—*Apportionment of less than* £100 *on county—Validity—Enforceability of decree by means of Writ of Fieri Facias—Criminal Injuries (Ireland) Act.* 1919 (9 *Geo.* 5, *c.* 14)—*Criminal Injuries (Ireland) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 66) *sections* 3, 9.

The applicant brought a claim for compensation for criminal injury against the L. County Council only, in respect of the malicious burning of his mill and machinery in the County of L. The malicious act in respect of which the claim was made occurred in the County of L. within one mile of its boundary with the County of T. The necessary preliminary notice was served on the L. County Council, and this was followed by notice of application for compensation which was also served on the County Council of L., the compensation to be levied off the county or such county or other district, parish, townland or other denomination as the County Court Judge should direct.

By notice the solicitors for the County Council of L. intimated that on the hearing of the application, they would apply that so much of the compensation as to the Recorder of L. might seem right should be levied off the County of T. or other district, parish, townland or sub-denomination. This notice was received by the Secretary of the County Council of T. and by the Clerk of the C. Rural District Council. The Recorder of L. made a decree in favour of the applicant and ordered that the T. County Council be added as respondents. He declared the applicant entitled to £160 compensation and £11 12s. 7d. for costs, of which £128 14s. 5d. should be paid by the county of L. and £42 18s. 2d. by the county of T., the sum of £128 14s. 5d. to be raised by the County Council of L. off the electoral division of L. Upper and the sum of £42 18s. 2d. to be raised by the County Council of T. in accordance with the provisions of 6 & 7 Wm. 4, c. 116, section 140.

No question was ever raised on behalf of the County Council of T. as to their not having sufficient particulars of the malicious injury or as to their having too short notice.

(1) In the King's Bench Division before Andrews, L.C.J.

Subsequently the applicant obtained an order from the King's Bench Division giving him liberty to issue a writ of certiorari to remove the decree into the High Court. The applicant also obtained a writ of fieri facias on foot of the order of certiorari. The County Council of T. then applied for an order directing that the order giving liberty to the applicant to issue a writ of certiorari to remove the decree into the High Court and all subsequent proceedings consequent on that order be set aside.

*Held*, by Andrews, L.C.J., that the Recorder of L. had ample jurisdiction to make the apportionment of compensation contained in his decree;

*Held also* that there was no substance in the point that the procedure adopted was not expressly provided for by the rules, but in any case such an irregularity could not affect a jurisdiction which undoubtedly exists and accordingly should not be allowed to affect the validity of a decree from which an appeal might have been but was not taken;

*Held further* that a criminal injury decree which has been removed to the High Court on certiorari is enforceable by writ of *fieri facias*.

MOTION to set aside order giving liberty to issue a writ of certiorari.

In June, 1927, the applicant, Thomas Crilly, brought a claim for compensation for criminal injury against the Londonderry County Council only, in respect of an alleged criminal injury suffered by him by his mill and machinery being maliciously burned in the County of Londonderry.

The malicious act in respect of which the claim for compensation was made was a fire which occurred on 15th May, 1937, in the County of Londonderry within one mile of its boundary with the County of Tyrone. The necessary preliminary notice was duly served on the Londonderry County Council, and this was followed by notice of application for compensation which was also served on the County Council of Londonderry on 20th May, 1937, for hearing at sessions to be held on 24th June at Magherafelt.

By notice dated 23rd June, the solicitors for the County Council of Londonderry intimated that on the hearing of the application, they would apply that so much of the compensation as to the Recorder might seem right should be levied off the County of Tyrone or other district, parish, townland or sub-denomina-

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tion. This notice was received by the secretary of the County Council of Tyrone and by the clerk of the Cookstown Rural District Council on 25th June. The former duly acknowledged it on the same date; and his letter was followed by one from the solicitor to the Council, dated 26th June, in which he challenged the legality of the course proposed to be taken. At the same time he wrote to the County Court registrar of the County of Londonderry stating that he did not intend to appear at the hearing and giving as his reason that he did not consider the Recorder had any power to add the County Tyrone.

The hearing duly took place on 29th June, 1937, and the Recorder of Londonderry made a decree in favour of the applicant. The decree recited due service on the respondents the County Council of Londonderry and all other proper and necessary parties and ordered that the County Council of Tyrone be added as respondents. He declared the applicant entitled to £160 compensation and £11 12*s.* 7*d.* for costs, of which £128 14*s.* 5*d.* should be paid by the County of Londonderry off the electoral division of Lissan Upper, and the sum of £42 18*s.* 2*d.* to be raised by the County Council of Tyrone in accordance with the provisions of 6 & 7 Wm. 4, c. 116, section 140. The decree contained the provision that in case there was no power to apportion the compensation and costs between the Counties of Londonderry and Tyrone, the whole should be levied on the electoral division of Lissan Upper in the County of Londonderry.

After the decree had been made the solicitor to the County Council of Tyrone wrote to the solicitors for the County Council of Londonderry stating that in his opinion the decree of the Recorder of Londonderry was wholly illegal and as the decree only affected the Cookstown Rural District Council he was passing the matter of the appeal on to their solicitor. No appeal was lodged on behalf of either the County Council of Tyrone or the Cookstown Rural District Council. No question was ever raised on behalf of the County Council of Tyrone as to their not having sufficient particulars of the alleged malicious injury or as to their having too

short notice. No application for adjournment was sought on either ground.

On 11th March, 1938, the applicant obtained an order from the King's Bench Division giving him liberty to issue a writ of certiorari directed to the County Court Judge of the County of Londonderry to remove the decree into the High Court.

The applicant also obtained a writ of fieri facias on foot of the order of certiorari.

The County Council of Tyrone then applied for an order directing that the order giving liberty to the applicant to issue a writ of certiorari to remove the decree into the High Court and all subsequent proceedings consequent on that order should be set aside.

Section 140 of the Grand Jury (Ireland) Act, 1836, provides that in case the malicious injury be committed on the verge or within the distance of one mile of the boundary of any two or more counties, the person who shall sustain such injury may apply for compensation in the manner by the Act and Rules of Court directed in either or any of such neighbouring counties; and all proceedings shall be taken thereupon as by the Act and Rules of Court provided with respect to other applications for damages for malicious injury; and in case any sum or sums of money shall be decreed by the County Court the Judge of Assize shall have power and authority to apportion the amount of such compensation amongst such neighbouring counties.

The section also provided that it should be the duty of the Grand Jury (now the County Council) of a neighbouring county to that in which the decree is made to resolve that the proportion directed to be paid by them, when the same shall exceed £100 shall be levied off the county at large, and if under £100 shall be raised off the district in or near to which such injury shall be alleged to be committed.

Section 5 (2) of the Local Government (Ireland) Act, 1898, provides that upon an application for compensation for criminal injuries, the County Court may either refuse the application, or make a decree against the county council, and if the decree is made, shall have the power of a Judge of Assize under section 140 of the

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Grand Jury (Ireland) Act, 1836, with respect to the apportionment of the compensation.

The relevant rules of procedure as to compensation for criminal injuries are No. 5 and No. 7. Rule 5 provides for service of the preliminary notice and prescribes the time for service. Rule 7 provides for service of notice of application for compensation in forms Nos. 7 and 8, and in case it is sought to apportion the compensation between or amongst two or more counties the notice shall be addressed to and served on the secretary and clerk respectively of councils of every county and district sought to be affected.

Section 1 (2) of the Criminal Injuries (Ireland) Act, 1919, provides (inter alia) that the application for compensation may be made either as against the council of the county in which the murder, maiming, or injury occurred or, at the option of the applicant, as against that council and the council or councils of any neighbouring county or counties, and in that event any compensation awarded may be apportioned by the County Court Judge or Judge of Assize as between the several county councils in such proportions as he thinks proper.

Section 3 of the Criminal Injuries (Ireland) Act, 1920, provides that any decree made against a county council whether before or after the passing of this Act for compensation for criminal injuries may, irrespective of the amount recovered, be removed to the High Court on certiorari under section 9 of the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, and any rates payable by any ratepayer to the council may, as well as any other debts due to the council, be attached to answer the amount recovered by the decree when so removed, together with the costs of or incidental to the proceedings in the High Court including the costs of the removal.

Section 9 of the Civil Bill Courts Procedure Amendment (Ireland) Act, 1864, provides that "If a Judge of "a Superior Court shall be satisfied that a party "against whom judgment for an amount exceeding "twenty pounds, exclusive of costs, has been obtained "in a Civil Bill Court has no goods or chattels which

"can be conveniently taken to satisfy such judgment, "he may, if he shall think fit, and on such terms as to "costs as he may direct, order a writ of certiorari to "issue to remove the judgment of the Civil Bill Court "into one of the Superior Courts, and when removed "it shall have the same force and effect and the same "proceedings may be had thereon as in the case of a "judgment of such Superior Court, but no action shall "be brought upon such judgment."

*Hume, K.C.*, and *Bradley McCall* for the Tyrone County Council.

We submit the following propositions—(a) There is no power to apportion compensation unless proper notice is given in accordance with the rules of procedure, (b) There is no power to apportion a sum less than £100 on the county at large, (c) There is no power to issue a writ of fieri facias to enforce the payment of a criminal injury decree by a county council.

As to the first point the decree is bad as the Recorder had no power to apportion compensation upon the County Council of Tyrone as the notice of application was on Form 7 and not as it should have been on Form 8. Proper notice must be served on the adjoining or verge county in accordance with the rules.

Section 140 of the Grand Jury (Ireland) Act, 1836, is of very considerable importance.

In *R.* (*McCarthy*) *v. Cork County Council* (1) it was held that where the injury had been done at a place within the distance of one mile of the boundaries of two counties, the power given to the Court to apportion the burden of compensation between such counties is not properly exercised by a decree which imposes that burden exclusively on the county in which the injury was not done, and such a decree is invalid.

Assuming that there is jurisdiction to bring in the verge county that can only be done in accordance with the rules. There was ample time for the home county to serve the verge county. The foundation of the whole criminal injury code is the notice of application.

The Recorder had no jurisdiction to make the decree.

(1) [1918] 2 I.R. 20.

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In making the apportionment of less than £100 on Tyrone, the Recorder had no jurisdiction to place it on the county at large. Under section 140 of the Grand Jury (Ireland) Act, 1836, his power was limited to imposing it on the district in or near to which the injury shall be alleged to have been committed.

As to the third point that there is no power to issue a writ of fieri facias to enforce the payment of a criminal injury decree by a county council, we rely on *Bridge v. Branch* (1). That was a case which turned upon section 48 of the Mayor's Court of London Procedure Act, 1857.

That section enacted that a judgment removed from that Court to a Superior Court should have the same force and effect as a judgment recovered in the Superior Court.

It was held that it is competent to the Court to which such judgment is so removed to set it aside, if satisfied that it was obtained in a matter over which the inferior court had no jurisdiction.

Some importance must be attached to the marginal note to section 3 of the Criminal Injuries (Ireland) Act, 1920. This marginal note is " Attachment of rates to " answer decrees for compensation for criminal injuries " 27 & 28 Vict., c. 99."

We rely on the words of the section. The express power to attach rates and other debts due to the council negatives the right to enforce the judgment by any other method such as a writ of fieri facias.

*Black, K.C.* (with him *McSparran*) for the applicant :

In *R.* (*McCarthy*) *v. Cork County Council* (2), Gibson, J., said : " The right ought not to depend on the elec- " tion of the applicant, whose interest it might be to " confine the area of levy to the application county, " where his rateable property might be insignificant, " and to exonerate the adjoining county, where his " rateable liability might be heavy." Since the applicant has brought his application in one county the jurisdiction under section 140 of the Grand Jury (Ire-

(1) 1 C.P.D. 633 (2) [1918] 2 I.R. 20, 29.

land) Act, 1836, coupled with section 5 (2) of the Local Government (Ireland) Act, 1898, is established.

The applicant proceeded in one county as he was legally entitled to do.

The jurisdiction to make an award and to apportion between the counties arises when an application is made.

The County Council of Tyrone could have appealed to the Judge of Assize.

We rely on *Williams v. Bolland* (1) where it was held that where a judgment is removed from an inferior to a superior Court under 1 & 2 Vict., c. 110, section 22, for execution, the superior Court has no jurisdiction to inquire into the merits or into the regularity of the proceedings in the Court below. In his judgment, Brett, J., said when a judgment is removed from an inferior to a superior Court under this statute, it is only for the purpose of enabling the superior Court to execute the judgment. No jurisdiction is given to the superior Court to inquire into the merits or into the regularity of the proceedings in the court below.

The decision in *Bridge v. Branch* (2) is quite consistent with what was decided in *Williams v. Bolland* (1). In *Williams v. Bolland* (1) which arose upon the words of a statute, the Court refused to set aside a judgment which had been removed from the Passage Court at Liverpool, on the ground that the objection which was of a mere irregularity might and ought to have been taken in that Court. In *Bridge v. Branch* (2), the foundation of the judgment was a matter over which the court had no jurisdiction.

The law is correctly stated in *Halsbury*, Volume 14, page 12: "Speaking generally, judgments and orders "for the recovery or payment of money or for the re- "covery of land against incorporated bodies, whether "public or private, are executed in the same manner "as against individuals; and their property, real or "personal, may be taken in execution even though, in "certain circumstances, it is held in trust for public "purposes."

(1) 1 C.P.D. 227. (2) 1 C.P.D. 633.

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In *Worral Waterworks Company v. Lloyd* (1), land which had been conveyed to a local board of health, for the purposes of the Public Health Acts, was used as a reservoir for the supply of water to the district of the local Board. A judgment having been obtained against the local board in the name of their clerk. It was held that the land was liable to be taken under a writ of elegit.

As regards reliance on the marginal note to section 3 of the Criminal Injuries (Ireland) Act, 1920, we rely on the judgment of Lord Hanworth, M.R., where he said in his judgment in *Nixon v. Attorney General* (2): "As explained by Baggallay, L.J., in *Attorney-General* "*v. Great Eastern Rly.* (3), marginal notes are not a "part of an Act of Parliament. The Houses of Parlia- "ment have nothing to do with them, and I agree with "the learned Lord Justices in that case—*Bramwell*, "*James and Baggallay*—that the courts cannot look at "them."

In *Gibbons v. Bandon Town Commissioners* (4), the defendants were constituted the Town Commissioners of Bandon, under the Towns Improvement Act, 1854. Upon the application of the plaintiff who had obtained an unsatisfied judgment, the Court appointed a Receiver by way of equitable execution over so much of the surplus of the rates as should be sufficient to discharge the judgment of the plaintiff.

(They also referred to *Lloyd v. Cork Co. Council* (5), *The King* (*Bennett*) *v. Co. Council of King's Co.* (6).

*Patton*, for the County Council of Londonderry :—

The County Council of Tyrone had ample time to write a letter to the Registrar, which was anything but respectful. They had ample time to appeal. They did not apply for a writ of certiorari to quash this decree. The Recorder has put on the face of his decree that all necessary parties had been served with notice. The Court is asked on behalf of the Tyrone County

(1) 1 C.P. 719.
(2) [1930] 1 Ch. 566, 593, 594.
(3) 11 Ch.D. 449, 461.
(4) 3 N.I. J. 145.
(5) [1920] 2 I.R. 405.
(6) [1908] 2 I.R. 176.

Council to make a declaration that the decree is bad. Setting aside a decree is not a matter for a Judge sitting alone. What is really sought in the motion is a declaration that the decree is bad.

There is a striking difference between the proceedings in *Williams v. Bolland* (1) and the proceedings in *Bridge v. Branch* (2).

I submit that these present proceedings are entirely misconceived. The decree made by the Recorder still remains.

I rely on the words used by Miller, J., in giving judgment in *In re Conaty* (3), where he said : " I do not sit " here as an Appellate Court from the Recorder's Court ; " and although this Court possesses the power, it will " not go behind a decree made in the Recorder's Court " and inquire into the consideration of it, unless it can " be shown that it is an unrighteous judgment, and " that a wrong has been done, and more particularly " that the parties have exhausted all the means in their " power of appealing against it."

In the present case the Tyrone County Council did not exhaust all the means of appeal open to them.

I submit your Lordship should exercise your discretion by refusing the application.

*Cur. adv. vult.*



ANDREWS, L.C.J. : This is a motion by the County Council of Tyrone for an order that an order made by me on 11th March, 1938, and all subsequent proceedings consequent thereon be set aside. By the said order it was ordered that the applicant (erroneously called " plaintiff ") be at liberty to issue a writ of certiorari directed to the County Court Judge of the County of Londonderry to remove into this Court a decree obtained by the applicant against the respondents (erroneously called " defendants ") on 24th June, 1937, for the sum of £160 debt and £11 12*s.* 7*d.* costs, of which £40 debt and £2 18*s.* 2*d.* costs to be paid by the County Council of Tyrone were still unpaid.

(1) 1 C.P.D. 227.
(2) 1 C.P.D. 633.
(3) 3 L.R.I. 463, 465.

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The decree referred to was made by the Recorder of Londonderry on the hearing of a criminal injury application brought by the applicant, Thomas Crilly, against the County Council of Londonderry. The decree recites due service on the respondents and all other proper and necessary parties and ordered that the County Council of Tyrone be added as respondents. It declared the applicant entitled to £160 compensation and £11 12*s.* 7*d.* for costs, of which £128 14*s.* 5*d* should be paid by the County of Londonderry and £42 18*s.* 2*d.* by the County of Tyrone, the said sum of £128 14*s.* 5*d.* to be raised by the County Council of Londonderry off the electoral division of Lissan Upper, and the said sum of £42 18*s.* 2*d.* to be raised by the County Council of Tyrone in accordance with the provisions of 6 & 7 Will. IV., c. 116, section 140. The decree ended with the somewhat remarkable provision that in case there is no power to apportion the said compensation and costs between the said Counties of Londonderry and Tyrone, the whole should be levied on the electoral division of Lissan Upper in the County of Londonderry.

The malicious act in respect of which the compensation was awarded was a fire which occurred on 15th May, 1937, in the County of Londonderry within 1 mile of its boundary with the County of Tyrone. The necessary preliminary notice was duly served on the Londonderry County Council, and this was followed by notice of application for compensation, which was also served on the County Council of Londonderry on 20th May, 1937, for hearing at sessions to be held on 24th June at Magherafelt, the compensation to be levied off the said county or such county or other district, parish, townland or other denomination thereof as the County Court Judge should direct.

By notice, dated 23rd June, the solicitors for the County Council of Londonderry intimated that on the hearing of the application, an application would be made that so much of the compensation as to the Recorder might seem right should be levied off the County of Tyrone or other district, parish, townland or subdenomination thereof. This notice was received by the secretary of the County Council of Tyrone and by the

clerk of the Cookstown Rural District Council on 25th June. The former duly acknowledged it on the same date; and his letter was followed by one from Mr. Dickie, solicitor to the Council, dated 26th June, in which he challenged the legality of the course proposed to be taken. At the same time Mr. Dickie wrote to the County Court registrar of the County of Londonderry saying that he did not intend to appear at the hearing and giving his reasons therefor.

The hearing duly took place on 29th June, when the decree (dated 24th June) was made as above stated. On 1st July Mr. Dickie heard from the registrar and also from the solicitors for the County of Londonderry the effect of the decree which had been made; and thereupon he wrote by letter of 1st July to the solicitors for the County Council of Londonderry repeating his view that the action of the Recorder was wholly illegal, and intimating that as the decree only affected the Cookstown Rural District Council, he was passing the matter of the appeal on to their solicitor, Mr. Twigg, and he had no doubt that he would take the necessary steps to protect the County Council against such applications in future. No appeal was lodged on behalf of either the County Council of Tyrone or the Cookstown Rural District Council to the Judge of Assize.

From the facts above stated it will appear that no question was ever raised on behalf of the County Council of Tyrone as to their having sufficient particulars of the alleged malicious injury or as to their having too short notice. No application for adjournment was sought on either ground. The attitude of the County Council was one of defiance—the illegality of any apportionment of the decree on the County of Tyrone; and in the circumstances I am not prepared to listen to any suggestion of surprise such as is made by Mr. Dickie in paragraph 5 of his affidavit filed on 16th May, 1938.

The first point made in support of the motion by Mr. Hume on behalf of the County Council of Tyrone is that the decree is bad as the Recorder had no power to apportion compensation upon the County Council of Tyrone owing to the fact that the notice of application

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was on Form No. 7 in the County Court Rules of 6th June, 1919, and not on Form No. 8. The former is the ordinary notice, whilst the latter applies only to cases in which the applicant intends to apply for an apportionment of his compensation amongst two or more counties where the malicious injury has been committed within the verge of two or more counties. Proper notice, it was submitted by Mr. Hume, must be served on the adjoining or verge county in accordance with the rules.

The section which confers the right upon an applicant to claim compensation from a verge county is section 140 of The Grand Jury (Ireland) Act, 1836, which provides that in case the malicious injury be committed on the verge or within the distance of one mile of the boundary of any two or more counties, the person who shall sustain such injury may apply for compensation in the manner by the Act and rules of court directed in either or any of such neighbouring counties ; and all proceedings shall be taken thereupon as by the Act and rules of court provided with respect to other applications for malicious injury. The section further provides that in case any sum be decreed by the County Court, the Judge of Assize shall have power and authority to apportion the amount of such compensation amongst such neighbouring counties. Under the section it is also the duty of the Grand Jury (now the County Council) of a neighbouring county to that in which the decree is made to resolve that the proportion directed to be paid by them, when the same shall exceed one hundred pounds, shall be levied off the county at large, and if under £100, shall be raised off the district in or near to which such injury shall be alleged to be committed. By section 5 (2) of the Local Government Act, 1898, the county court is given the power of a judge of assize under section 140 of the Act of 1836 with respect to apportionment of the compensation.

The relevant rules of 6th June, 1919, are No. 5 and No. 7. The former provides for service of the preliminary notice and prescribes the times for service. Rule 7 prescribes for service of notice of application for

compensation in (amongst others) forms No. 7 and 8 above referred to ; and it provides that in case it is sought (i.e. in my opinion sought by the applicant) to apportion the compensation between two or more adjoining counties, the notice shall be addressed to and served on the secretary and clerk respectively of the councils of every county and district sought to be affected.

It is clear that under section 140 and the rules to which I have referred, the initiation of bringing in a verge or adjoining county lies with the applicant, and it must be admitted that the rules do not contain any provision expressly enabling one county council to serve notice upon or bring in another county council as respondents to the proceedings. This was clearly recognised by Fitzgibbon, L.J., in *Fitzgerald v. Tipperary County Council*, (1) in which, where the malicious act was committed in Tipperary within one mile of the boundary of County Cork, it was argued on behalf of the County Council of Tipperary that the notice under Form 5 (now Form 7) was bad and that the notice should have been in Form 6 (now Form 8) ; but Fitzgibbon, L.J., held that it was optional for the applicant to serve the notice in either Form 5 or 6.

The procedure therefore is clearly prescribed by the rules and forms so far as the applicant is concerned ; but the question remains whether, when the applicant in a case falling within section 140 proceeds only against one county, it is competent for that county to bring in one or more other neighbouring counties. No provision is made for such procedure in the rules, but in my opinion the practice of doing so has been so frequently exercised and recognised by the Courts that it would be quite improper for me now to ignore it. Thus in *R.* (*McCarthy*) *v. County Council of Cork* (2), in which it was held that the power to apportion the burden of compensation between two neighbouring counties is not exercised by a decree which imposes the burden exclusively on the county in which the injury was not done, Gibson, J., after referring to *Fitzgerald's case* (1), said that " the application may be made in any

(1) 41 I.L.T.R. 80. (2) [1918] 2 I.R. 20.

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"county within section 140 and is not confined to the "home county. The application county is interested "in having the other counties brought in to bear their "possible share. The right ought not to depend on "the election of the applicant, whose interest it might "be to confine the area of levy to the application "county, where his rateable property might be in-"significant, and to exonerate the adjoining county, "where his rateable liability might be heavy. What is "to happen if the judge thinks the adjoining county "should be charged ? Would the application in such "case fail wholly or pro tanto ? Or could the judge, "notwithstanding that the rules of 1899 as to time, "notices, etc., had not been complied with, adjourn "the hearing to enable the outside county to be made "defendants, with inevitable delay and costs ? Is not "the true view of section 140 that, though the appli-"cation may be made in any of the prescribed counties, "all the counties possibly affected are to be treated as "if one county, but with special conditions as to the "units of levy ? Such special units, inconsistent with "those in section 135, indicate a distinct mode of deal-"ing with counties in combination, and such mode can "hardly be displaced by the choice of the applicant in "selecting one county."

No words could be clearer in support of the view that the right to bring in a neighbouring county ought not to depend solely on the election of the applicant ; and in the opinion of the learned judge where only one county has been served the judge may dispense with notices upon the other counties, all the counties possibly affected being treated as one.

I must also refer in this connection to the case of *Lloyd & Another v. Cork County Council* (1). Applications for compensation in respect of pers nal injuries were made under the Criminal Injury (Ireland) Act, 1919, against the County of Cork only, in which area the injuries were inflicted just outside the City of Cork. The Recorder gave decrees to be levied off the rural district of Cork. Notice was served upon Cork County Borough that upon the hearing of the appeal the Dis-

(1) [1920] 2 I.R. 405.

trict Council of Cork rural district would apply to have the compensation apportioned and a portion placed upon the County Borough of Cork. Samuels, J., on appeal increased the amounts of the decrees and apportioned the same as to one moiety on the County of Cork and the other moiety on the City, a case being stated by him as to whether in the case of an application for compensation under the Act of 1919, where the application is made by the applicant against the Council of the County in which the injury occurred, and such injury occurred within one mile of a neighbouring county, the judge had power to apportion an amount of the compensation between the two counties. The difficulty arose from the use of the words " at the " option of the applicant " in the third paragraph of section 1 (2) of the Act of 1919, which restricted the power of apportionment to cases in which it was invoked by the applicant. This Sir James Campbell, C., said would lead to an extraordinary situation, because it would follow that the applicant, who may have no interest in the locality in which the money was to be raised and a substantial interest in getting the money, would have the power of determining the area of levy. The Court, however, came to the conclusion that in this case, where the injury occurred within one mile of the boundary, section 140 of the Act of 1836 applied, as section 5 (2) of the Local Government (Ireland) Act, 1898, extends to and includes injuries to persons as well as to property, and gives jurisdiction in all cases to apportion compensation awarded for criminal injuries in the manner provided by section 140 of the Grand Jury (Ireland) Act, 1836. In these circumstances the Court held without hesitation that the power of apportionment between the County and the City existed though the applicant had claimed against the county only.

On these authorities and the principles on which they are based, I hold that the learned Recorder had ample jurisdiction to make the apportionment of compensation contained in his decree.

If there be any substance, as I consider there is not, in the point that the procedure adopted is not expressly

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provided for by the rules, such an irregularity could not in my opinion affect a jurisdiction which undoubtedly exists ; and it, accordingly, should not be allowed to affect the validity of a decree from which an appeal might have been but was not taken. Perhaps I should also add that this is not a motion to set aside the decree, but to set aside my order that a writ of certiorari should issue to bring up the decree. The decree undoubtedly exists ; and, as Mr. Patton put it for the Londonderry County Council, what is really sought in the motion is a declaration that the decree is bad—an application in my experience wholly unprecedented in such circumstances as those which exist in the present case.

Mr. Hume's next objection to the decree was that, in making the apportionment of less than £100 on Tyrone, the Recorder had no jurisdiction to place it on the county at large ; that under section 140 of the Grand Jury Act his power was limited to imposing it on the district in or near to which the injury shall be alleged to have been committed. This argument is, in my opinion, based on an entire misapprehension of the decree, which, in full accordance with the provisions of the statute, after directing the amount which the applicant should recover from the County Council of Tyrone, provides in express terms that such sum be raised by the County Council of Tyrone in accordance with the provisions of section 140. For further elucidation of the point, if any be required, I would refer to *R.* (*McCarthy*) *v. County Council of Cork* (1), and to the leading article upon that case in 52 I.L.T. at pp. 127-8.

This brings me to the last point upon which Mr. Hume relied—that there is no power to issue a writ of fieri facias to enforce the payment of a criminal injury decree by a county council. Although a matter of considerable importance, it can be more briefly dealt with. It is admitted that prior to the passing of the Criminal Injuries (Ireland) Act, 1920, the only method of enforcing payment of a decree for compensation under the Criminal Injury code was by mandamus to compel the County Council to strike a rate. The whole law upon the subject is clearly stated in *Sullivan v.*

(1) [1918] 2 I.R. 20.

*Gilltrap* (1), and *R.* (*Bennett*) *v. County Council of King's County* (2). In the former case it was held that a garnishee order could not be made in respect of an amount awarded as compensation for malicious injury as there was no existing debt by the County Council which could be attached. The amount awarded was not, until raised, a debt directly payable, and the appropriate remedy for the enforcement of a criminal injury decree was by mandamus. In the latter case a conditional order for mandamus commanding the Treasurer of the County Council (the Hibernian Bank Ltd.) out of such moneys as were under its control, or if same were insufficient, then out of the first moneys coming to its hands as treasurer, to pay the amount of the decree and costs, was discharged as the Council were not empowered to pay sums awarded for criminal injuries out of the general funds of the county levied and collected for other purposes of a public nature. Here again it is made clear that the granting of a decree does not amount to the creation of a debt ; it merely declares the applicant entitled to a certain sum for compensation, which compensation is directed to be levied off a particular area. It casts upon the County Council a duty to raise, levy, and pay—a duty enforceable by mandamus.

The difficulty which applicants experienced in the troublous times of 1919-20 in obtaining payment of the amounts of their decrees from certain county councils led to the amendment of the law effected in the first instance by section 1 (4) of the Criminal Injuries (Ireland) Act, 1919, and subsequently by the more comprehensive provisions of the Criminal Injuries (Ireland) Act, 1920, which repealed the former enactment. By section 1 (1) of this latter Act, the amount recovered was declared to be a debt due by the council and payable by them on demand out of the moneys under the control of the treasurer, or if they were insufficient, out of the first moneys coming to his hands as such treasurer. This sub-section in itself transformed the whole character of a malicious injury decree and the method of enforcing payment of the compensation awarded

(1) 2 N.I. J.R. 212. (2) [1908] 2 I.R. 176.

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under it. In effect it reversed the decision of the Court in *Bennett's case* (1). Section 1 (2) provided for payment by instalments where the amount could not be raised by means of a rate in one year without imposing an excessive burden on the ratepayers. Section 2 empowered the Lord Lieutenant to make an order enabling a deduction of criminal injuries compensation to be made from grants payable to local authorities, and deemed sums deducted in this manner to have been applied for the purposes for which the grant was voted notwithstanding anything to the contrary in any Act—an admittedly very drastic remedy. Then follows section 3 with which alone we are directly concerned in the present case. It enacts as follows :—

"Any decree made against a county council whether "before or after the passing of this Act for compensa- "tion for criminal injuries may, irrespective of the "amount recovered, be removed to the High Court on "certiorari under section nine of the Civil Bill Courts "Procedure Amendment Act (Ireland), 1864, and any "rates payable by any ratepayer to the council may, "as well as any other debts due to the council, be "attached to answer the amount recovered by the "decree when so removed, together with the costs of "or incidental to the proceedings in the High Court, "including the costs of the removal."

Here again was another entirely new departure in legislation under the Criminal Injury code—the removal of a decree into the High Court on certiorari under section 9 of the Act of 1864. What did this latter section provide ? It enacted that "If a Judge "of a Superior Court shall be satisfied that a party "against whom judgment for an amount exceeding "twenty pounds, exclusive of costs, has been obtained "in a civil bill court has no goods or chattels which "can be conveniently taken to satisfy such judgment, "he may, if he shall think fit, and on such terms as to "costs as he may direct, order a writ of certiorari to "issue to remove the judgment of the civil bill court "into one of the Superior Courts, and when removed it "shall have the same force and effect and the same

(1) [1908] 2 I.R. 176.

"proceedings may be had thereon as in the case of a "judgment of such Superior Court, but no action shall "be brought upon such judgment."

Under this section a judge of a superior court was empowered in the events therein mentioned to order a writ of certiorari to issue to remove the judgment of the civil bill court into one of the Superior Courts. Then follow the important words that, when removed, it (i.e. the judgment) "shall have the same force and "effect and the same proceedings may be had thereon "as in the case of a judgment of such superior court." One of the proceedings which may, of course, be had upon a judgment of the Superior Court is the issuing of a writ of fieri facias ; and, accordingly, it would seem naturally to follow that a criminal injury decree removed into the High Court under this section is enforceable by means of such a writ. Mr. Hume's answer to this argument is, as I understand it, two-fold. He referred me in the first place to the marginal note to the section which merely states "Attachment of "rates to answer decrees for compensation for criminal "injuries 27 & 28 Vict., c. 99." In my opinion, the reference to 27 & 28 Vict., c. 99, takes away largely from the weight which Mr. Hume places on the marginal note ; but in any event the law is far too well settled to permit of any doubt that marginal notes are not part of an Act of Parliament and the Courts cannot look at them. *Nixon v. Attorney General* (1), and *O'Neill v. The Northern Ireland Road Transport Board* (2) are amongst the most recent authorities on the point. But Mr. Hume relies in the second place on the words of the section itself, submitting that the express power to attach rates and other debts due to the council negatives the right to enforce the judgment by any other method such as a writ of fieri facias. I confess to having been at first somewhat impressed with this argument, but on reflection I am satisfied that it cannot prevail. These words cannot in my opinion as a matter of legal construction delete from section 9 of the Act of 1864 in its application to criminal injury decrees the

(1) [1930] 1 Ch. 566, 593, 594.

(2) [1938] N.I. 104, 116.

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clear and cogent words to which I have referred, that "the same proceedings may be had thereon as in the "case of a judgment of such superior court." Moreover, I am clearly of opinion that a perfectly satisfactory explanation can be given for the express inclusion in the section of this power of attachment of rates by reason of the decision of Porter, M. R. in *Murphy v. Guardians of the Belmullet Union* (1), in which it was held that an order would not be made on a Board of Poor Law Guardians attaching poor rates due to them to satisfy a judgment. From this it appears that if section 3 of the Act of 1920 had merely given power to remove the decree into the High Court and had not made any reference to the attachment of rates, this remedy would not have been open to an applicant whose decree had been removed into the High Court. It was in fact an additional remedy which would not have existed as a result merely of the decree being removed on certiorari. If, as is suggested, the power to remove the decree on certiorari was intended to be mere machinery to enable rates to be attached, one would have expected that the section would have first conferred this power of attachment and then provided that for this purpose the decree should be removable into the High Court.

In further support of the view which I have expressed I would refer to section 9 of the Act of 1920, which provides that every power given by this Act for the enforcement of payment of compensation in respect of criminal injuries shall be in addition to, and not in derogation of, any other powers or rights for the purpose, whether given by this or any other Act or existing at law or by custom or otherwise.

In conclusion, I would only add that, even if I were wrong in my opinion that this decree is enforceable by writ of fieri facias, this would not justify the setting aside of my order giving the applicant liberty to issue the writ of certiorari. It would at most only warrant a declaration or other such order as to the invalidity of the writ of fieri facias.

(1) 22 L.R.I. 215.

For these reasons I hold that the motion of the County Council of Tyrone should be refused with costs.

Solicitor for the applicant: *L. R. Hastings.*

Solicitor for the Tyrone County Council: *John F. Dickie.*

Solicitor for the Londonderry County Council: *William A. Lane.*

J. McC.

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## THE KING (WILLIAMS) v. McALEVEY (1).

Ch. 13.

*Premises used for Purposes of Betting with Persons resorting thereto —"Owner"—Betting Act,* 1853 (16 & 17 *Vict., c* 119) *section* 3.

A summons against the defendant for permitting premises at 72, Carlisle Street, Belfast, of which he was alleged to be the owner, to be used by other persons for the purposes of betting with persons resorting thereto was dismissed by the resident magistrate on the ground that the defendant was not the "owner" of the premises. The defendant, in a statement to the police, had said that he was the owner of the said premises but had let them to M'P. as a dwelling-house with no restriction as a monthly tenant and that he was aware that M'P. was using the premises for a purpose other than living in.

At the hearing before the resident magistrate an assignment of the said premises to M. for a term of 1,000 years subject to a rent of £5 per annum was produced, and it was argued that M. was the "owner" of the premises within the meaning of section 3 of the Betting Act, 1853.

*Held*, that any person who is entitled in fee simple in possession or who is beneficially in receipt of rent from the occupier may be an "owner" of premises within the said section.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division by the resident magistrate sitting at Belfast Petty Sessions as follows :—

This is a case stated by the resident magistrate sitting at Belfast Petty Sessions pursuant to the Summary Jurisdiction Act, 1857, on the application in writing of the complainant who is dissatisfied with the determination (hereinafter set forth) as being erroneous in point of law, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

At Belfast Petty Sessions held on the twenty-second day of June, 1938, the complainant, a district inspector of the Royal Ulster Constabulary charged the defendant by summons as follows :—"That the defendant in the "said district and county being the owner of a certain

(1) In the King's Bench Division before Andrews, L.C.J., and Brown, J.

"house situate at 72, Carlisle Street, in the City of "Belfast did knowingly and wilfully within six months "last past permit the same to be used by other persons "for the purpose of betting with persons resorting "thereto, contrary to the Betting Act, 1853."

Mr. J. S. V. Mills appeared as solicitor for the complainant, and Mr. William Lowry, K.C., instructed by Mr. Gibson Barron, solicitor, appeared for the defendant, who was not present.

Evidence for the prosecution was given by Sergeant Alfred A. Colhoun, Royal Ulster Constabulary, who proved that he interviewed the defendant on the fourth day of May, 1938, regarding the ownership of the house, 72, Carlisle Street, and that the defendant made the following statement which the Sergeant wrote down and which the defendant signed :—"I am the owner of "premises, 72, Carlisle Street, Belfast, and have it let "to a man named Myles McPartland, 3, St. James' "Parade, Belfast, as a dwelling house with no restric-"tions as a monthly tenant.

"I am aware that Mr. McPartland is using the pre-"mises for a purpose other than living in.

"I have read over the above statement and it is all "true.

"(Signed) Hugh McAlevey."

The Sergeant also proved that during the period covered by the summons nine convictions had been obtained against various persons for using the said house as a betting house and Mr. Lowry on behalf of the defendant admitted that the defendant knew, throughout the said period, that the said house was being used for that purpose.

Mr. Lowry produced an assignment dated 14th day of May, 1934, made between Ambrose I. Weir of the one part and Miss Anna Meakin of the other part whereby the premises were assigned to Miss Anna Meakin for the residue of a term of 1,000 years from the first day of May, 1920, created by a lease dated 4th June, 1920, made between Charles Dean of the one part and Gregory Flynn of the other part subject to the yearly rent of £5 reserved by the said lease. He also produced a search in the Registry of Deeds against

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Miss Anna Meakin from the date of the said assignment to the 20th June, 1938, which did not disclose any act by Miss Meakin in relation to the premises. Mr. Gibson Barron gave evidence to the effect that he had acted for Miss Meakin when she acquired the premises, and he proved the assignment and also that he had the search made in the Registry of Deeds. In cross-examination he stated that he thought it was possible that Myles McPartland, the occupier, had taken the premises from the defendant and that the defendant was the person receiving the rent from Myles McPartland. He also stated that the statement to Sergeant Colhoun would seem to indicate that the defendant had an interest in the premises, but he could not say what the nature of that interest was, and that the statement also showed that the defendant must not have understood that the Sergeant was discussing the ownership or title to the house as distinct from the business carried on in the house.

Mr. Lowry submitted that having regard to the documents of title produced and Mr. Barron's evidence he had proved that Miss Meakin, and not the defendant, was the owner of the premises within the meaning of section 3 of the Betting Act, 1853. He stated that at one time the defendant had carried on a business in the premises and had handed it over to Myles McPartland, and he contended that the defendant must have made his statement to Sergeant Colhoun under a misapprehension as to his legal position.

Mr. Mills submitted that having regard to the defendant's statement and his solicitor's evidence it was clear the defendant had some interest in the premises and was the immediate landlord of Myles McPartland, the occupier, and that the immediate landlord was the owner within the meaning of the section.

The resident magistrate held as a fact that Hugh McAlevey, the defendant, was not the owner of the premises in question and further found as a fact that the defendant is in receipt of rent from Myles McPartland, but held that the fact did not constitute the defendant an owner of the premises within the meaning of the section in question. Accordingly, he dismissed

the summons on the merits and referred to the fact that his predecessor, Colonel Toppin, had given a considered judgment in a case where an immediate landlord of premises who was only an intermediate lessee had been prosecuted and Colonel Toppin had decided that an intermediate lessee was not an owner within the meaning of this section.

The decision of the Court is sought as to whether the resident magistrate was right in his decision as to the meaning of the section.

*The Attorney General* (*E. S. Murphy, K.C.*) and *Maginess* for the complainant.

The only question to be decided is whether the defendant is the owner of premises within the meaning of section 3 of the Betting Act, 1853.

The defendant's admission that he was the owner of the premises put the *onus* upon the defendant of showing that he was not in fact the owner ; and that *onus* was not discharged by any evidence given at the hearing before the magistrate. The magistrate found that the defendant was in receipt of rent from M'Partland.

There is no definition of the term owner in relation to the Betting Act, 1853. In the Intoxicating Liquor (Licensing) Act, 1872, the "owner of licensed pre-"mises" is defined as "the person for the time being "entitled to receive, either on his own account or as "mortgagee or other incumbrancer in possession, the "rack-rent of such premises."

In the Public Health (Ireland) Act, 1878, the term "owner" means the person for the time being entitled to receive the rack-rent of the lands or premises in connexion with which the word is used whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

The term "owner" in relation to the Betting Act, 1873, cannot be confined to the owner in fee simple. It means either the person entitled in fee simple or beneficially in receipt of rent from the occupier.

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*Lowry, K.C.*, and *W. M. McCall* for the defendant.

An admission in order to be strong evidence must be clear and unambiguous.

It has clearly been established that Miss Meakin is the owner of the premises.

When the defendant used the word "owner" he meant that he was the owner of the business carried on in the premises as distinguished from the premises themselves.

[They referred to the judgment of Lord Alverstone, C.J., in *The King v. Deaville* (1)].

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ANDREWS, L.C.J.: This case has been fully and clearly stated by the Resident Magistrate, Mr. M'Coy. A summons was brought against the defendant under section 3 of the Betting Act, 1853, "that he, being the "owner of a certain house, situate at 72, Carlisle Street, "in the City of Belfast, did knowingly and wilfully "within six months last past permit the same to be "used by other persons for the purpose of betting with "persons resorting thereto." On the hearing of the summons it was admitted by Mr Lowry on behalf of the defendant, that the defendant knew that this house was being used for the purpose of betting, yet he never took any step to prevent or put a stop to such user. In these circumstances the only point which we have to determine is was the defendant the owner of the premises within the meaning of section 3.

The material evidence in the case was summarized by the Attorney General in his opening statement. First there is the admission of the defendant to Sergeant Colhoun; and secondly the evidence of the defendant's solicitor, Mr. Gibson Barron. Reliance was also placed on the statement of Mr. Lowry to which I shall later refer.

The statement made by the defendant is in my opinion of great importance. When interviewed by the Sergeant regarding the ownership of the premises he said "I am the owner of the premises, 72 Carlisle Street, "Belfast, and have it let to a man named Myles "McPartland, 3 St. James's Parade, Belfast, as a

(1) [1903] 1 K.B. 468, 475

"dwelling house with no restrictions as a monthly "tenant. I am aware that Mr. McPartland is using "the premises for a purpose other than living in." Pressed with this admission Mr. Lowry contended that an admission can only constitute strong evidence against a defendant when it is clear and unequivocal; and he suggests that when the defendant used the word "owner" he meant that he was the owner of the business carried on in the premises as distinguished from the premises themselves.

In my opinion such a construction would do complete violence to the language used. Nothing could be more clear and unequivocal than the admission of the defendant.

Secondly, as to the evidence given by Mr. Gibson Barron. On cross-examination Mr. Barron said that he thought it was possible that Myles McPartland, the occupier, had taken the premises from the defendant, and that the defendant was the person receiving the rent from McPartland.

He also said that the statement to Sergeant Colhoun would seem to indicate that the defendant had an interest in the premises, but that he could not say what the nature of that interest was, and that the statement also shewed that the defendant must not have understood that the Sergeant was discussing the ownership or title to the house as distinct from the business carried on in the house. The only matter of importance which emerges from this evidence is that Mr. Barron thought it possible that the defendant was lessor of the premises to McPartland.

There remains to be considered the statement of Mr. Lowry who submitted that having regard to the documents of title produced and Mr. Barron's evidence he had proved that Miss Anna Meakin, and not the defendant, was the owner of the premises within the meaning of section 3 of the Betting Act, 1853. He stated that at one time the defendant had carried on a business in the premises and had handed it over to Myles McPartland, and he contended that the defendant must have made his statement to Sergeant Colhoun under a misapprehension as to his legal position

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and that this is a defence to the charge. This statement was unsupported by evidence.

The magistrate says in the case that he held as a fact that Hugh McAlevey, the defendant, was not the owner of the premises in question, and that he further found as a fact that the defendant is in receipt of rent from Myles McPartland, but he held that that fact did not constitute the defendant an owner of the premises within the meaning of the section in question. In regard to that finding I cannot accept the view that the question whether the defendant was the owner of the premises within the meaning of the said section is a question of fact. In my opinion it is a question of law which arises for determination on the established facts of the case.

I am accordingly satisfied that in the present case we are not debarred from the consideration in this Court of the question as to whether the defendant is the owner of the premises. The material finding of the magistrate was that the defendant was in receipt of rent from Myles McPartland.

I am quite unable to accept the suggested definition of " owner " as being simply a person who holds in fee simple. There is no definition of " an owner " in the Act, but reference was made during the argument to the definitions of the term contained in section 2 of the Public Health Act, 1878, and section 74 of the Intoxicating Liquor (Licensing) Act, 1872. These definitions do not of course determine the matter in the present case ; but, in the absence of any statutory definition in the Act of 1857, they throw some light on the class of person whom the legislature recognised as being an owner of premises. Whilst not purporting to give an exhaustive definition of the term " owner " I may say that in my opinion a person who is entitled in fee simple in possession or who is beneficially in receipt of rent from the occupier may be an " owner " of premises within the section.

Reliance was placed by the defence on an assignment of the premises dated 14th May, 1934, to a Miss Anna Meakin for the unexpired residue of 1,000 years term. The production of this one deed established nothing really material to the defence. It is quite

possible in any event that this deed may have related to a different interest in the premises from that enjoyed by McPartland.

For the reasons stated I am clearly of opinion that the decision of the resident magistrate was wrong, and we direct that the case be sent back to him in order that he may proceed according to law.

BROWN, J. : I concur.



Solicitor for the Crown : *R. Haldane Carson.*
Solicitor for appellant : *Gibson Barron.*

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Nov. 14.

## THE KING (MAGILL) v. CROSSAN (1).

*Motor Cycle—Policy of Insurance not in force—Disqualification for holding Licence—Motor Salesman—Licence required for purpose of Business—Whether "Special Reason"—Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. 24) section 6 (2).*

The defendant, who was a motor agent or salesman, was convicted at Petty Sessions of using a motor cycle on the public highway there not being in force in relation to the user thereof a policy of insurance or security against third party risks in compliance with the Road Traffic Act (Northern Ireland), 1930.

Section 6 (2) of that Act provides that a person convicted of an offence under the section shall (unless the Court for special reasons thinks fit to order otherwise and without prejudice to the power of the Court to order a longer period of disqualification) be disqualified for holding or obtaining a licence under section 3 of the principal Act for a period of twelve months from the date of conviction.

The magistrate decided not to disqualify the defendant for holding a licence on the ground that the fact that the defendant required the licence for the purpose of carrying on his business constituted a special reason within the meaning of the said section 6 (2).

*Held*, that a special reason within the exception prescribed by section 6 (2) is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence; and that a circumstance peculiar to the offender as distinguished from the offence is not a special reason.

CASE STATED for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division by the resident magistrate sitting at Crumlin Petty Sessions as follows :—

This is a case stated by the resident magistrate sitting at Crumlin Petty Sessions on the 22nd day of August, 1938, pursuant to the Summary Jurisdiction Act, 1857, on the application in writing of the complainant who is dissatisfied with his determination (hereinafter set forth) as being erroneous in point of law, for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

At Crumlin Petty Sessions held on the 22nd day of August, 1938, the complainant, a Head Constable of

(1) In the King's Bench Division before Andrews, L.C.J., and Brown, J.

the Royal Ulster Constabulary charged the defendant by summons as follows :—"That on 15th July, 1938, "at Seacash, defendant did use a motor cycle on the "public highway, there not being in force in relation "to the user thereof such policy of insurance or security "against third party risks as complies with the Statute "20 and 21 Geo. 5, c. 24."

At the hearing it was proved or admitted that the defendant, who was a motor agent or salesman, had possession of a motor cycle for the purpose of carrying out repairs to it for its owner ; when he had the repairs completed he was riding it on the public highway on the 15th July, 1938, with a view to ascertaining if the machine was working satisfactorily before returning it to its owner ; when so doing he was stopped by the police and was unable to produce a certificate of insurance ; it was subsequently ascertained by the police that the owner of the motor cycle had it insured but the policy limited the driving of it to the owner ; that the policy of insurance had been taken out by the owner of the motor cycle through the defendant.

The resident magistrate convicted the defendant of the offence charged and also convicted him at the same Court of a similar offence under exactly similar circumstances in respect of the user of a motor cycle on 12th July, 1938. Mr. H. A. Maginess, solicitor, Lisburn, who appeared for the defendant, urged the resident magistrate not to disqualify the defendant for holding or obtaining a licence under section 3 of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, on the ground that he required it for his business as a motor agent and salesman, and if he lost it he would be unable to carry on his business. The complainant pointed out that the defendant had two previous convictions for similar offences—one at Crumlin Petty Sessions on 25th March, 1935, and the other at the same Petty Sessions on 27th January, 1936, and urged the resident magistrate to disqualify the defendant, stating that these were very grave offences, as, in the event of an accident involving injury, the injured person might not be in a position to recover compensation through the defendant's failure to be properly covered by insurance.

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The resident magistrate was satisfied that the defendant knew he was not covered by insurance but wanted to test the motor cycle, and took the risk, but as the resident magistrate was also satisfied that the defendant required his licence for the purpose of carrying on his business and as the resident magistrate was of opinion that this constituted " special reasons " within the meaning of section (6) 1 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. 24), the resident magistrate decided not to disqualify the defendant, and imposed a fine of forty shillings and ordered that he should not be disqualified.

The decision of the Court is sought as to whether the resident magistrate was right in law in not disqualifying the defendant for holding or obtaining a licence for a period of twelve months under section 6 (2) of the said Motor Vehicles and Road Traffic Act (Northern Ireland) 1930.

*The Attorney General* (*E. S. Murphy, K.C.*) and *Maginess* for the complainant.

By section 6 (2) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, a person convicted of an offence under this section shall (unless the Court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification) be disqualified for holding or obtaining a licence under section three of the principal Act for a period of twelve months from the date of the conviction.

The section is mandatory in form. The question to be decided is whether the fact that the defendant required a licence in order to carry on his business constitutes a " special reason " why he should not be disqualified for holding a licence under this subsection.

There is no decided authority on this point but in *C. N. Shawcross On the Law of Motor Insurance* the author referring to section 35 (2) of the Road Traffic Act, 1930, which is in *pari materia* with the said section 6 (2), says at page 251 " The phrase ' special reasons ' " is nowhere defined. The exception from or extension " of the period of disqualification provided in the sub-

" section is left to the discretion of the Court. The " effect of the prescription of ' special reasons ' indi- " cates that exception from automatic disqualification " is to be given rarely and only for reasons special to " the particular case under consideration,"

[They also referred to the remarks of Mr. Justice Goddard made to the County Justices on the occasion of the Essex Assizes at Chelmsford, cited from the Journal of Criminal Law, July, 1937, at page 350].

In *The King (Wright) v. County Court Judge of Tyrone* (1), it was held that an " extenuating circumstance " under section 8 (2) of the Intoxicating Liquor Act, 1923, must be a circumstance in connection with the offence and that the previous good character of the defendant was not an " extenuating circumstance."

If " special reasons " bears the meaning given it by the magistrate the legislature has introduced into the Act an exemption for a particular class of person.

There was no appearance on behalf of the defendant.

ANDREWS, L.C.J.

ANDREWS, L.C.J. delivered the judgment of the Court.

We do not feel that there is any necessity to reserve our judgment in this case as the point is a short one upon which we have formed a clear opinion. At the same time we regret there has been no appearance on behalf of the defendant which has imposed upon the Attorney General the responsibility of bringing everything before us which he considered material for the proper determination of the question involved.

The point in issue is whether the mere fact that the defendant carried on a motoring business constitutes a " special reason " why he should not be disqualified for holding or obtaining a licence as provided by section 6 (2) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930. That section enacts that if a person acts in contravention of the section he shall be liable on summary conviction to a fine or to imprisonment as therein mentioned, and a person convicted of an offence under the section shall (unless the Court for special reasons thinks fit to order otherwise and without

(1) [1930] N.I. 182.

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prejudice to the power of the Court to order a longer period of disqualification) be disqualified for holding or obtaining a licence under section 3 of the principal Act for a period of twelve months from the date of the conviction.

The section, I may say, is in practically identical terms with section 35 (2) of the English Road Traffic Act of 1930.

The true way in which to interpret the section is that which was suggested by the Attorney General in the course of his argument, namely, to omit, in the first instance the words in brackets. The material portion of the section then reads :—" A person convicted of an " offence under this section shall be disqualified . . ." The section is mandatory in form, for the offence was regarded by Parliament as a serious one ; and, although the Court has a discretion under the bracketed words to order otherwise if special reasons exist, the general practice in favour of disqualification is clearly established.

It seems to us that no stronger case could be brought forward on its facts than the present case. This was not the defendant's first offence of this kind. He was convicted on two former occasions of a similar offence and again at the same Court at which he was convicted for this offence. On all four occasions when so convicted the fact that he was engaged in the motor business was held to be a " special reason " for not disqualifying him for holding a licence.

Now it seems to us that if this be a special reason in the present case it must constitute a special reason in every other case in which the defendant may be charged so long as he continues to carry on the motor business. Further, if it amounts to a special reason in the defendant's case it would likewise be such in the case of all other persons similarly circumstanced, and if we were so to hold we would in effect be introducing a special exemption into the Act of Parliament in favour of members of the motor business community.

The view which I have expressed is based upon general principle ; but in the absence of decided authority the learned Attorney General has referred us to a

helpful note to be found at page 251 of that excellent text book of *C. N. Shawcross on the Law of Motor Insurance.* After referring to the corresponding section of the English Act section 35 (2) which I have already mentioned and to the automatic character of the disqualification unless special reasons exist, the note reads: "The phrase 'special reasons' is nowhere de- "fined. The exception from or extension of the period "of disqualification provided in the sub-section is left "to the discretion of the Court. The effect of the "prescription of 'special reasons' indicates that ex- "ception from automatic disqualification is to be given "rarely and only for reasons special to the particular "case under consideration. With this qualification, "the discretion of the Court is left with a wide field. "This discretion must, however, be properly exercised "in every case, 'according to the rules of reason and "justice, not according to private opinion'; nor must "it be, 'arbitrary, vague, and fanciful, but legal and "regular.'" The words quoted in inverted commas in this passage are taken from the speech of Lord Halsbury, L.C., in *Sharp v. Wakefield* (1891) A.C. 173 cited to us in argument. The learned Attorney General, also referred us to the remarks of Mr. Justice Goddard (cited from the Journal of Criminal Law, July, 1937, page 350) made to the County Justices on the occasion of the Essex Assizes at Chelmsford on 10th June, 1937, in which, after referring to the diverse practices prevailing on the subject of the indorsement and suspension of motor licences, he expressed the hope that it would not be long before a case was brought before the High Court in order that authoritative pronouncement might be given on the vexed question as to the meaning of the term 'special circumstances.'

"The provision in the Act," he continued, "that "indorsement and suspension might be dispensed with "in special circumstances is intended to give justices "discretion, and in regard to that there are, in my "view, two good rules to be borne in mind. One is "that no hard and fast rule can be laid down and that "discretion must be exercised with regard to each "particular case, and, secondly, discretion must be

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"exercised judicially. That rule is a great deal easier "to state than apply.

"On many occasions people ask that a licence should "not be endorsed because they are first offenders, but "Parliament has not chosen to say that for a first "offence a licence should not be endorsed. Some "benches do not endorse licences because the defen- "dant is a professional driver and the endorsement "might affect his livelihood.

"The discretion given by Parliament must, however, "be regarded as limited discretion. It seems to me "the rule should be this: that you must seek to find "circumstances which are special to the particular case "and not to the particular offender.

"You may find a case in which a man exceeds the "speed limit because he is suddenly called to attend a "dying relative, or a doctor going to an urgent call. "You may find a case of a man driving without a "certificate of insurance, which is regarded by the Act "as a very serious offence. Forgetfulness or an un- "blemished record as a driver cannot be special circum- "stances. Special circumstances would be that owing "to the fraud or neglect of an insurance agent there "was no effective policy in force, although the driver "honestly believed it was in force.

"Those are the sort of matters which it seems to me "the Courts can take into account, and if they en- "deavour to follow the formula I have given, more "uniformity will be brought into this important branch "of the law."

We are of course not in any way bound by the opinions expressed in the passages which I have cited; but on the best consideration which we can give the matter we have no hesitation in adopting them as our own. A "special reason" within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the Court ought properly to take into consideration when imposing punishment. A

circumstance peculiar to the offender as distinguished from the offence is not a "special reason" within the exception. The fact that the defendant in the present case is engaged in the motor business is a circumstance of this latter character. If Parliament intended that such persons should enjoy an immunity from disqualification for holding licences it should, and I have no doubt would, have said so.

We can see no reason whatever why a man engaged in the motor business, who uses his motor on the public highway without having a policy of insurance in force, should be in a more privileged position than any other member of the public. In our opinion his connection with the business would naturally make it all the more incumbent upon him to ensure that the requirements of the law in regard to the use of motor vehicles are complied with.

The case must be sent back to the resident magistrate so that he may proceed according to law. We allow costs to the appellant.

Solicitor for the complainant : *Chief Crown Solicitor.*

J. R.

C.A. 1939.

Jan. 31.
Feb. 1, 2.
March 3.

## POTTER v. CARLISLE AND THE CLIFTONVILLE GOLF CLUB LTD. (1).

*Negligence—Golf—Risks of the Game—Rules of the Game—Notices—Terms implied in contract between Club and Player on payment of Green Fee—Liability of Golf Club to ordinary members and to visiting members—Duties and liabilities of ordinary members and visiting members inter se—Nature and construction of Course as affecting liability—Functions of the Judge and Jury—Effect of Jury's Rider.*

A golf player in the course of a game whilst putting on a green was struck by a ball driven by a player from an adjoining tee and lost the sight of an eye.

*Held*, by the Court of Appeal (Babington, L.J., and Brown, J., Best, L.J., having died during the period between the hearing and the delivery of judgment, but having during his lifetime agreed to the conclusions expressed in the judgment), that the Lord Chief Justice should have acceded to the request of counsel for the Club and withdrawn the case against the Club from the jury on the grounds that when the plaintiff paid his green fee and received his ticket, he impliedly agreed to take the course as he found it, provided it was free from unusual dangers or traps, and to accept the risks of the game as between himself and the Club, and that the injury he received was due to a risk of the game and not to any negligent design or construction of the course.

*Held, also*, that the plaintiff could not on appeal rely on new matter imported into the case for the first time by the jury by way of rider to their findings.

Every player when on the course must take due care for his own safety and for the safety of others by keeping a good look out for the disposition of the various greens and tees as he is coming to them or going from them, more especially if he is a stranger to the course, and must keep a good look out for the whereabouts of other players, whether in front or behind, in whose line he may find himself, thereby running the risk of being hit, or who may appear in his line so that he runs the risk of hitting them ; also, he must act on the knowledge so acquired and not place himself in a position where he is in danger of being hit by other players if he can avoid it, nor himself play a shot while other players are in a place where he may hit them without giving them due warning and being satisfied that they have received it.

(1) In the Court of Appeal before Best, L.J., Babington, L.J., and Brown, J.

MOTION by the defendants, the Cliftonville Golf Club, Ltd., for an order that the verdict and judgment obtained against them in an action tried by Andrews, L.C.J., and a special jury, should be set aside and that judgment should be entered for them.

The facts and findings of the jury are fully set out in the judgment of Babington, L.J.

The jury appended the following rider to their findings :—

"May it please your Lordship and if it is in "order for us to make a recommendation, the "jury consider that the bush and saplings constitute "a definite danger, in that they create a false sense "of security in the minds of persons putting on the "seventh green or driving from the eighth tee, "whilst providing practically no protection."

On the findings judgment for £1,500 and costs was entered for the plaintiff, Albert Potter, against the Cliftonville Golf Club, Limited, and for the defendant, Samuel Carlisle, Junior, against the plaintiff with costs, the plaintiff to have Carlisle's costs over against the Golf Club.

The verdict and judgment in favour of the defendant, Samuel Carlisle, Junior, was not challenged, but the Cliftonville Golf Club, Limited, appealed against the verdict and judgment against them on the ground (*inter alia*) that there was no evidence to support the findings that they were negligent or that the plaintiff's injuries were caused or contributed to by such negligence, and they asked that the verdict and judgment against them should be set aside and that judgment should be entered for them with costs.

*Beattie*, K.C., *A. Black*, K.C., and *Topping* for the appellants, The Cliftonville Golf Club, Ltd.: —

The plaintiff undertook the risk of being struck by a golf ball.

The bush or saplings mentioned by the jury in their rider were not referred to in the pleadings nor was evidence given with regard to them.

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There is no evidence showing negligence on the part of the Cliftonville Golf Club, whose duty was not to set a trap, and to see that there was no unusual danger. The onus is on the plaintiff to show that there was negligence on the part of the appellants which caused the injury.

The cause of the accident was not that the tee and green were close together.

The test of negligence in the construction of a golf course is what is the usual standard in the construction of golf courses throughout the United Kingdom.

It is quite usual to have greens and tees situated like those in the present case. It cannot be said that there is anything wrong with the design of this hole.

Lord Alness, in delivering the judgment of the Privy Council, in *Vancouver General Hospital v. McDaniel* (1), said that the technique challenged by the respondent was in accord with general, if not with universal, practice to-day in Canada and the United States.

Lord Alness then went on to say : " If that be so, " it is in their Lordships' opinion, again difficult to " affirm that negligence on the part of the appellants " is proved. A defendant charged with negligence " can clear his feet if he shows that he has acted in " accord with general and approved practice." In the present case, the appellants acted in accordance with universal practice in the lay-out of the links.

The appellants rely on the evidence given not only by their own witnesses but also by Mr. Fairweather and Mr. McHugh for the plaintiff.

The learned Lord Chief Justice should have said there is no evidence to go to the jury under the head of negligence. Warning notices could not have prevented this accident.

There is no use in warning players of an obvious danger.

Care on the part of both the plaintiff and the defendant Carlisle would have prevented any accident.

(1) 152 L.T. 56, 57.

The plaintiff who had been playing golf for so long was both *volens* and *sciens*. There was no added exceptional risk in playing on this course.

A player must take reasonable care for his own safety. *Hall v. Brooklands Auto Racing Club* (1).

It cannot be said that the plaintiff was guilty of no contributory negligence. He stated in evidence that he "was perfectly oblivious to other players on 'course at that particular time."

The finding of the jury that plaintiff was guilty of no contributory negligence makes the verdict of the jury perverse in view of his statement that he "was "perfectly oblivious to other players on course."

The jury's rider shows that they were influenced by matters which were not given in evidence. They took into consideration matters, such as the question of the saplings, which were not properly before them. They took upon themselves to consider matters outside their province.

There was no evidence proper to be submitted to the jury on the question of negligence, but assuming that there was such evidence, the answers of the jury were not in conformity with the evidence.

It is remarkable that any jury would say that neither Carlisle nor the plaintiff was guilty of negligence. That is a perverse finding and entirely against the weight of evidence.

It is perfectly clear that this occurrence took place because one man was not taking care of himself and another man was not taking care of a fellow-player.

In *Metropolitan Railway Co. v. Wright* (2), it was held that a new trial ought not to be granted on the ground that the verdict of the jury was against the weight of evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find.

There was no evidence of negligence as to the lay-out of the links.

(1) [1933] 1 K.B. 205, 214. (2) 11 A.C. 152.

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There was a duty imposed upon the plaintiff which he did not carry out. There is nothing to support any case against the Club.

The plaintiff laid his claim under two heads: (*a*) negligence, (*b*) nuisance. The jury have said by their answers that the plaintiff cannot succeed on nuisance but he can succeed on negligence, although both causes are founded on the same facts.

A man going out to play golf takes certain risks, and he must observe reasonable vigilance. He runs the risks incident to golf courses. There are certain usual dangers on all golf courses. One of these dangers is the existing lay-out.

We have not been able to find any case where a club has been made responsible for injury to a player on the course.

In *Cleghorn v. Oldham* (1), the plaintiff while she was carrying the defendant's golf clubs on a golf course, was struck with a golf club by the defendant when she (the defendant) was demonstrating a stroke to the plaintiff's brother with whom the defendant was playing. In that case, Swift, J., said in the course of his judgment: "A person who went on to a golf "course, just as a person who crossed the street, took "certain risks inherent to the place where he was."

A man who goes on to a golf course is not guaranteed safety.

Madden, who gave evidence at the trial, stated that "every golfer knows he is subject to certain risks "—dangers on every course. Everyone has to be "vigilant."

If the appellants are guilty of actionable negligence, then all the well-known clubs such as St. Andrews, are also guilty of actionable negligence.

The plaintiff has to show that the absence of notices caused or contributed to the accident. The defendant knew the danger of driving from this tee. It is not necessary to warn players of obvious dangers. A notice is intended to give warning of a danger which

(1) 43 T.L.R. 465, 467.

is not obvious. Even if there should have been notices, the absence of notices did not conduce to the accident.

The plaintiff himself said in the course of his evidence, "I suppose the real reason (of the accident) was that "Carlisle pulled his shot."

Another witness, Clements, who was playing with the defendant Carlisle, stated in his evidence that: "Potter did not seem to realize we were there at all, "either when going out to his ball or returning."

A player who is "perfectly oblivious to other "players on the course," is not taking proper precautions. This evidence as to Potter being "perfectly oblivious" is conclusive evidence of contributory negligence.

On the question of liability to invitees, the law is clearly stated by Andrews, L.J., in *Gilmour v. Belfast Harbour Commissioners* (1).

*The Attorney-General* (*E. S. Murphy, K.C.*), *J. D. Chambers, K.C.*, and *McVeigh*, for the plaintiff:—

*Mechanical and General Inventions Co. and Lehwess v. Austin and the Austin Motor Co.* (2), lay down the principles which should guide an appellate court in reviewing the verdict of a jury. One of these principles is that when it is decided that a case is to be tried by a jury, that tribunal is the only judge of the facts, and no appellate tribunal can substitute its findings for that of the jury. In that case Lord Wright stated in the course of his opinion: "The appellate court is "never the judge of fact in a case where the constitu-"tional judge of fact is the jury.

"For the appellate court to set aside the verdict of "a jury as being against the weight of evidence, "merely because the court does not agree with it, "would, in my opinion, be to usurp the functions of "the jury and to substitute their own opinion for that "of the jury; that would be quite wrong. Much

(1) [1933] N.I. 114, 137. (2) [1938] A.C. 347.

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"more is necessary in order to justify the setting aside "of a jury's verdict where there is some evidence to "support it."

Fairweather, in his evidence, stated that: "Driving "from front half of eighth tee there is definitely "danger to persons on seventh green from a badly "played shot. I would not play from front of "eighth tee with persons on added four yards of "seventh green. Person without skill increased "danger. This danger could be prevented. I would "change portion of eighth tee and put it to left of "seventh green. I would suggest notice preventing "playing from eighth tee when any one on seventh "green."

It was proved in evidence that there was danger, and that that danger could be prevented in one of several ways.

Evidence similar to that of Fairweather was given by FitzHugh, the professional at the Knock Golf Club. He stated: "Danger point is back four or "five yards of green. I would not drive if anyone on "that part of green. Several ways of abolishing "risk: (1) take four or five yards off green; (2) could "move eighth tee and put near hedge on left; (3) put "wire screen up nearer tee than river."

Madden, in his evidence, said: "I think a definite "danger exists at back of green—four or five yards of "green. I would not drive from eighth tee if persons "on back of seventh green. First remedy—remove "tee to other side of green. Second remedy—wire "netting. Prefer removal."

Alan Kidd stated in his evidence: "In a degree "there is an element of risk there at seventh green "and eighth tee which does not exist in other holes on "that course."

Willes, J., in his judgment in *Indermaur v. Dames* (1), in delivering the judgment of the court with respect to such a visitor (that is a visitor going upon business which concerns the occupier, and upon his invitation,

(1) L.R. 1 C.P. 274, 288.

express or implied) said: "At least, we consider it settled "law, that he, using reasonable care on his own part "for his own safety, is entitled to expect that the "occupier shall on his part use reasonable care to "prevent damage from unusual danger, which he "knows or ought to know; and that, where there is "evidence of neglect, the question whether such "reasonable care has been taken, by notice, lighting, "guarding, or otherwise, and whether there was "contributory negligence in the sufferer, must be "determined by a jury as matter of fact."

As pointed out by Scrutton, L.J., in *Hall v. Brooklands Auto Racing Club* (1), in which *Indermaur v. Dames* and other authorities are considered, that there is not "an absolute warranty" but "a promise "to use reasonable care to ensure safety" is implied.

We do not ask the court to put the principle any higher than warranted by this passage from Scrutton, L.J.'s, judgment.

[BROWN, J.: What is the criterion of reasonable care in the laying out of golf courses ?]

The evidence given in each particular case.

Scrutton, L.J., in his judgment in *Hall v. Brooklands Auto Racing Club* (1), refers with approval to the words used by Swinden Eady, L.J., in *Cox v. Coulson* (2), where he said: "The defendant must also be taken to "have contracted to take due care that the premises "should be reasonably safe for persons using them "in the customary manner and with reasonable care," and added that "the defendant does not absolutely "warrant the security of his premises. He does, "however, warrant, not only that there shall be due "care on the part of himself and his servants, but also "that there shall be due care on the part of any "independent contractor who may have been employed "by him in the construction or repair of the premises."

Greer, L.J., in *Hall v. Brooklands Auto Racing Club* (1) said: "I do not think the defendants are

(1) [1933] 1 K.B. 205, 214, 215, 216, 225.

(2) [1916] 2 K.B. 181.

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"under any obligation to provide safety under all "circumstances, but only to provide against damage "to spectators which any reasonable occupier in their "position would have anticipated as likely to happen."

Slesser, L.J., at page 230, adopts the principle set out by Scrutton, L.J.

Again, Andrews, L.J., in *Gilmour v. Belfast Harbour Commissioners* (1), said: "The owners of property, "whilst not under an obligation to keep their premises "absolutely free from obstructions, or always to "employ the best known modes of construction, must "at least take all reasonable care that such premises "can be used without danger, that is, that the "premises shall be as little dangerous as they reason-"ably can be having regard to the contrivances "necessarily used in carrying on the business. Thus "the owner of premises will expose himself to liability "towards an invitee by allowing a trapdoor through "which his visitor falls unnecessarily to remain open."

We submit that the findings of the jury were correct and that they were entitled to arrive at the findings which they did come to in fact.

[They also referred to *Castle v. St. Augustine's Links, Ltd.* (2).]

*Beattie, K.C.* (in reply):—

The case of *Castle v. St. Augustine's Links, Ltd.*, is not in point. That was a case of nuisance on a highway and could not apply to the present case.

[He also referred to *Mechanical and General Inventions Co. and Lehwess v. Austin and The Austin Motor Co.* (3), and *Steele v. Gilliland* (4).]

*Cur. adv. vult.*

BABINGTON, L.J.

March 3.

BABINGTON, L.J., delivered the judgment of the Court as follows:—

The Cliftonville Golf Club, Limited, are defendants in this action and move to set aside a verdict and

(1) [1933] N.I. 114, 137.
(2) 38 T.L.R. 615.
(3) [1935] A.C. 346.
(4) [1928] N.I. 19.

judgment for £1,500 obtained against them by Albert Potter, the plaintiff and respondent, who has lost the sight of an eye by being struck by a golf ball driven by Samuel Carlisle, junior, the other defendant, while he and the plaintiff were playing golf on a course belonging to the appellants.

The statement of claim alleges that the defendant Samuel Carlisle, junior, was negligent in the playing of the shot which injured the plaintiff, and that the Cliftonville Golf Links were so constructed as to be a nuisance to persons playing thereon, and alternatively that the defendant Company were negligent in the construction, management and control of their links by reason of which the plaintiff received the injuries in respect of which he sues.

The action was tried before the Lord Chief Justice and a special jury, and the following are the questions left to the jury and their answers thereto :—

1. Was the defendant, Samuel Carlisle, junior, guilty of negligence causing or contributing to the accident ?
   Answer : No.
2. Were the Cliftonville Golf Links (to the defendant company's knowledge) so designed and constructed by the defendant company at the seventh green and eighth tee as to be a nuisance and a danger to persons lawfully playing thereon ?
   Answer : No.
3. If so, were the plaintiff's injuries caused or contributed to thereby ?
   Not answered.
4. Were the defendant company negligent in—
   (*a*) the design and construction of the said links ?
   Answer : Yes.
   (*b*) failing to exhibit warning notices ?
   Answer : Yes.
   (*c*) failing to provide wire netting or other protection ?
   Answer : No.

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(*d*) altering seventh green by extending same ?
Answer : Yes.

(*e*) one or other of the respects mentioned in (*a*), (*b*), (*c*) or (*d*) ?
Answer : Yes.

5. If so, were the plaintiff's injuries caused or contributed to by any, and if so, by which of such acts of negligence ?
Answer : Yes, by (*a*), (*b*) and (*d*).

6. Was the plaintiff guilty of negligence causing or contributing to the accident ?
Answer : No.

7. If the answer to question 6 be in the affirmative could the defendant Carlisle by the exercise of reasonable care and skill have avoided the consequences of plaintiff's negligence ?
Not answered.

8. Did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran from the defendant Samuel Carlisle's alleged negligence impliedly agree to incur it ?
Answer : No.

9. Did the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran from the defendant company's alleged negligence impliedly agree to incur it ?
Answer : No.

10. Damages ?
Answer : One thousand five hundred pounds.

the following rider being appended to these findings by the jury :—

"May it please your Lordship and if it is in order "for us to make a recommendation, the jury "consider that the bush and saplings constitute "a definite danger, in that they create a false "sense of security in the minds of persons "putting on the seventh green or driving from "the eighth tee, whilst providing practically "no protection."

On these findings, judgment for £1,500 and costs was entered for the plaintiff, Albert Potter, against the

Cliftonville Golf Club, Limited, and for the defendant, Samuel Carlisle, junior, against the plaintiff with costs, the plaintiff to have Carlisle's costs over against the Golf Club.

The verdict and judgment in favour of the defendant, Samuel Carlisle, junior, is not challenged, but the Cliftonville Golf Club, Limited, have appealed against the verdict and judgment against them upon a number of grounds, the main one being that there was no evidence to support the findings that they were negligent and that the plaintiff's injuries were caused or contributed to by such negligence, and they ask that the verdict and judgment against them be set aside and that judgment be entered for them with costs.

The facts of this case lie within a very narrow compass but as the issues raise questions of considerable importance and wide application, it is necessary to scrutinize the evidence with some care.

The Cliftonville Golf Club, Limited, occupy an area of land in the city of Belfast round and about the old Belfast Water Works on which they have laid out a golf course resorted to by members of the Club and by visitors, who are allowed to play on the payment of green fees.

On the evening of August 10th, 1937, the defendant Carlisle went to this course to play with a friend called Clements, who apparently signed the Visitors' Book and paid Carlisle's green fee, whereupon they proceeded on to the course and began their game. This was Carlisle's first visit to the course.

On the same evening the plaintiff, Potter, also arrived at Cliftonville for a round with a friend called Wilson. Neither Potter nor Wilson was a member of the Club and Wilson paid the green fees for both. They started out immediately after Carlisle and Clements. Potter says that he had played not more than half a dozen times on the course and was not very familiar with it. Nothing of moment happened until the players arrived at the seventh green.

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Carlisle and Clements holed out on the seventh green and proceeded from that green to the eighth tee. Wilson, who was behind with Potter, saw Carlisle and Clements on the seventh green and saw them making towards the eighth tee. Potter does not say whether he saw them or not but they were undoubtedly there and he could have seen them if he had been looking.

Now the line from the eighth tee on this course passes very close to the seventh green, the ideal line being only 10 yards from the edge of the green, the distance between the eighth tee and the seventh green being about 30 yards. A fair idea of the lay-out can be obtained from the two maps proved in evidence.

There were no warning notices exhibited by the Club either to warn players not to approach the seventh green until the players in front have left the eighth tee or to warn the players in front to be careful not to drive while players are on the seventh green.

After Carlisle and Clements had holed out on the seventh green and had gone forward to the eighth tee, Potter and Wilson played their approaches to the seventh hole.

Potter's ball came to rest beyond the green, the actual distance is immaterial, and he walked to it and played back to the hole, and when he had taken two paces across the green, and three paces altogether, he was struck by a ball driven from the eighth tee by the defendant Carlisle, as a result of which he lost one of his eyes. He heard no warning shout. He did not hear the impact of the shot that struck him, he cannot recollect if he saw Carlisle and Clements on the eighth tee, and he says : " I was perfectly oblivious to other " players on course at that particular time." Wilson, who was already on the seventh green, looked up and saw them after Potter was struck. He had seen them going to the eighth tee and knew that they were preparing to drive from it.

Carlisle, the first-named defendant, says that when he and Clements arrived on the eighth tee Clements played first. Carlisle had apparently teed his ball

and was looking up the eighth fairway " when Potter " came out from back of seventh green across eighth " fairway. He went 12 to 15 yards from back end " of green. I had already teed up but stood aside till " Potter walked to ball. When he got there he turned " and played it. It was a good shot well into air. " After playing shot he proceeded to walk to green " briskly.

" I had been standing looking straight up eighth " fairway. When Potter two paces off edge of green " I turned round to address ball and on looking up " fairway to see line quite clear I turned to the ball " and went through usual preliminary movements— " five to six seconds. Everything all clear as I looked " up fairway. I struck ball and felt had played bad " shot and immediately shouted ' Fore.' Ball went " round my left shoulder. I ran forward on tee and " then on looking towards seventh green I saw Potter " staggering about on green. Ran down. I was " greatly upset. When I struck ball Potter was not " visible.

" (Cross-examined): Potter's shot 12 to 15 yards " across fairway from green. Shot not played with " putter. If I am right he is wrong and Wilson also. " When I saw him two yards from green I addressed " ball and did not see him again before shot. I knew " he was walking towards green. Not unusual thing " for me to pull my drive. Before I hit it I knew " always possibility I might either slice or pull drive. " One would take this into calculation. If I played " when his ball was three or five yards to right of line " of flight it would have been almost ' criminal.' If a " man three or five yards to left equally criminal. " Until Potter got definitely from line it would be " criminal to play. I couldn't say exactly how far " he should get to cease to be criminal. Walking as " fast as he was he should have been well away from " spot I last saw him in. I couldn't say if two yards " from green would have been safe or almost criminal. " I didn't consider if it was safe to drive with a man

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"in that position. I know now it wasn't safe to drive. "When I drove I called 'Fore' because I knew there "was a person walking to pin and might be someone "in line of flight. I thought ball might endanger "someone on seventh green. Likely there was another "person on green. I had seen a pair behind me in "distance. I didn't think it necessary to look again "for I was sure he would have been out of my vision. "I don't agree with Purdy that man could be seen on "green for two yards from where I struck. Can "only see slight part of back edge of green from where "I was driving—possibly a foot. Bushes prevent "seeing further. I pulled ball. Can't say if it went "through bush. It must have gone through bush. "I would say it did. This is first time I thought of "that. It is doubtful if I would have heard it going "through bush. He had kept on walking I presumed "and if he had he would have kept out of harm's way."

Clements, called on behalf of Carlisle, saw Potter come off the seventh green and says: "He didn't "appear to notice us. His ball 10 to 12 yards from "green. He turned round with back to us and "played towards seventh green. Potter did not "seem to realise we were there at all either when "going out to his ball or returning. Last glimpse I "had of Potter was when he was half-way to green. "I heard shout of 'Fore,' it (i.e., time of shouting) "would put Potter about just on to edge of green, the "first yard or so. That is where he was when I saw "him, on first yard of green. I heard Purdy say "you could see first two yards of green. I don't "disagree. I should think person would be safe on "first yard of green. Carlisle's game was good up to "that. I wouldn't say it would have been highly "dangerous thing to do prior to this. Last I saw of "him was when he was half-way from where ball "struck to green. Next place I saw him was one "yard on green after struck."

The foregoing statement of the evidence contains all the relevant facts as to the accident, and it is advisable to consider these facts, and the inferences

to be drawn from them, in so far as they relate to the players in the first instance, before considering the case for the Club.

Now these four people were not mere spectators, they were players taking part in this game of golf, and they knew or ought to have known that there are certain rules which it is the duty of all players, whether proficient or not, to know and observe if the game is to be played, as it apparently is played, in comparative safety.

The first of these rules, we think, is that every player, when on the course, must take due care for his own safety and for the safety of others by keeping a good look out for the disposition of the various greens and tees as he is coming to them or going from them, more especially if he is a stranger to the course, and he must keep a good look out for the whereabouts of other players, whether in front or behind, in whose line he may find himself, thereby running the risk of being hit, or who may appear in his line so that he runs the risk of hitting them.

The next rule is that he must act upon the knowledge so acquired and not place himself in a position where he is in danger of being hit by other players if he can avoid it, nor himself play a shot while other players are in a place where he may hit them without giving them due warning and being satisfied that they have received it. These are rules of safety very similar to the rules of the road which have to be observed by everyone who uses the highway.

If all players observe them, the game can be played in comparative safety, otherwise it becomes extremely dangerous, just as a highway becomes dangerous if motorists, cyclists, pedestrians and other road users fail to observe the rules of the road.

The learned Attorney General appealed to us not to apply our own knowledge to the problems raised in this case, but we cannot divest ourselves of all knowledge, and the measure of every player's duty stated above is we believe inherent in the game, and could be arrived at after reading the evidence

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in this case by anyone with the most limited knowledge of how the game is played, and without ever having struck a golf ball or heard of the Rules of the Royal and Ancient or the etiquette of the game.

These obvious rules of safety arise from the fact that in this game players must necessarily get in each other's way, more so perhaps on one course than on another, or more so at some holes on any particular course than at others. And when this happens and the above rules of prudence and safety come to be applied, one or other player or party of players must give way.

There is, so far as we are aware, or so far as the evidence in this case goes, no general rule as to who is to give way, and there are few signs or notices on golf courses corresponding to the halt, keep right, or keep left signs on our highways. Mr. Kidd, former chairman of the Golfing Advisory Committee of the British Golfing Union, says: "There is minimum of "notices in existence." They are, however, sometimes exhibited for the assistance of players, and in this case the jury have found that the Cliftonville Golf Club were negligent in failing to exhibit warning notices and that the plaintiff's injuries were caused or contributed to by this omission.

Reading the evidence, we cannot understand how the absence of notices can be said to have caused or contributed to this accident. The parties were in full view of each other. Potter was concentrating on his play and was, as he says, "perfectly oblivious "to other players on the course," but Carlisle saw him and after Potter had played his shot to the seventh green and had walked to the green and taken two paces across it, Carlisle, seeing the line immediately in front of him to be clear, proceeded to drive.

At this point of time Potter was not out of the danger zone in which a pulled shot from the eighth tee might strike him, and Carlisle did not warn Potter or satisfy himself that Potter was out of danger. He knew that Potter, who was then on the seventh green, was in danger, for he says, "I struck ball and felt "had played bad shot and immediately shouted

" 'Fore,' " and on cross-examination he amplifies this by saying, " When I drove I called 'Fore' because " I knew there was a person walking to the pin and " might be someone in line of flight. I thought ball " might endanger someone on seventh green. Likely " there was another person on green. I had seen a " pair behind me in distance."

From this evidence we can draw only one conclusion, namely, that Carlisle, knowing that Potter was in a position of danger, elected to take the risk of playing without warning Potter, and his immediate shout of " Fore " after he had played suggests that he was only too painfully aware of the possible results of his carelessness.

The right of precedence as between Carlisle and Potter was settled when Carlisle allowed Potter to play before he, Carlisle, drove, and when he drove he neglected to observe the elementary rule that he must not play while other players were in his possible line of flight without giving them due warning and satisfying himself that they had received it, and this was the cause of the injury which the plaintiff suffered.

Now, having dealt with the players, I come to the case against the Club.

The jury have found that the Club was negligent—

(*a*) in the design and construction of the links ;

(*b*) in failing to exhibit warning notices ; and

(*d*) by altering the seventh green by extending same ;

and that the plaintiff's injuries were caused by or contributed to by these acts of negligence.

There were two other heads of negligence left to the jury : Failing to provide wire netting or other protection, which they negatived, and a composite question No. 4 (*e*) : " One or other of the respects " mentioned in (*a*), (*b*), (*c*) or (*d*) " to which they answered " Yes." It is not necessary for us to consider the effect of this question, and the answer thereto upon the specific findings on which it is based. No argument was addressed to us to show that it added in any way to the scope or force of the prior findings and it may be disregarded.

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We have already dealt with the plea that the Club were negligent in not exhibiting notices by pointing out that the absence of notices was not a contributory cause of this accident, and at this point it becomes necessary to say a word or two as to such notices generally. Should there have been a notice on the seventh tee or fairway warning players not to proceed on to the seventh green until the players in front have driven from the eighth tee and are out of danger ? This is the form of notice displayed at the tenth hole of the Royal County Down Links and proved in evidence. The particulars of the 31st January, 1938, given by the plaintiff claim that there should have been a notice or warning either on the seventh green or the eighth tee. The former would appear to us to be too late as the players would be in the danger zone before meeting it, and it is not suggested what effective warning (if any) it could have conveyed. The notice on the eighth tee might have been a useful reminder to players driving from that tee to look out for players on the seventh green, but this would merely have been calling the attention of the players to a danger which they should have been fully alive to without any notice, and which might present itself at any time or place in the course of the round. A notice directing players not to proceed on to the seventh green until the eighth tee is clear would have imposed on the plaintiff the duty of giving way and might have placed him in the wrong when he went on to the seventh green before Carlisle had driven off the eighth tee.

An example of this kind of notice is given in the evidence of Sidney Fairweather, professional to the Malone Club, and one of the plaintiff's witnesses, where he says on cross-examination : " Notice on " County Down tenth hole not to play till off eleventh " tee."

Even if one were not familiar with this hole it can be deduced from this piece of evidence that the tenth is a one-shot hole and that the eleventh tee is so near the green that there is a danger of players from the tenth tee hitting players on the eleventh tee. The danger is obvious to both sets of players and both

have to take precautions to guard against it. If a party arrives on this tenth tee on the Royal County Down Links and sees players putting on the tenth green they cannot play until the players in front have holed out and left the green, and this is so whether there is a notice or no notice. If they then elect to play before the players in front are entirely out of danger they must give due warning by shouting "Fore," which is the ancient and generally recognised warning signal in this game.

What then happens shows quite clearly how the players adapt themselves to the dangers which are inherent in the game. The players in front may give way and stand aside until the party behind has played and then drive off the eleventh tee, or they may insist on their right of priority, which does not depend on the notice on the tenth tee but upon their place on the course.

This applies throughout the round of the course. When a player is in danger of striking another in the course of play he must attract the other player's attention by shouting "Fore," and when his attention has been so attracted the player must not play his shot until the other player has either moved into a position of safety or has signalled that he accepts the risk, which he sometimes does if he can see sufficiently well to be able to avoid it should it materialize. Notices can impose no added duty though, no doubt, they may be of assistance to the players in securing uniform practice as to priority of play at any given point on the course, and in so far as they do this they can be ignored if both parties agree and can do so in safety, or they may be a timely reminder of the player's duty to other players.

Failure to exhibit notices calling the attention of players to dangers which are obvious and apparent to anyone keeping a proper lookout cannot, therefore, be an act of negligence on the part of the Club, because it is the duty of the player to inform himself whether he can play his shot without injury to others and if he fails to do so, the resulting damage is caused by his act and not by any act of the Club who cannot

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control the player and do not impliedly warrant his skill or discretion.

There remains the question as to whether the findings that the Club were negligent in the construction of the course are such as the jury were entitled to find and whether there is any evidence to support them, but before proceeding to deal with this evidence it is necessary to examine the legal position of the plaintiff and his relationship with the Club.

The plaintiff had a contract with the Club. He presented himself to the Club through his friend Wilson, who paid both green fees to the Club and received tickets which entitled them to use the course.

It is obvious that this is not the whole contract. In *Hall v. Brooklands Auto. Racing Club* (1), Scrutton, L.J., dealing with a case of a spectator watching a spectacle says: "There must be an implied term in "the contract where you simply pay your money and "pass through a turn-stile"—and the "terms to be "implied are for the Court and not for the jury"—the jury, of course, finding any facts in dispute.

In *Hall's case* (1), the plaintiff, having paid for admission, was watching a motor race being run on a track constructed for racing when one of the cars left the track, dashed through the protective railings, struck the plaintiff and injured him. A jury awarded him damages against the proprietors of the race track on the grounds that they had failed by notices or otherwise to give warning of or protection from the dangers arising from the sport. The Court of Appeal set aside the verdict and entered judgment for the defendants, holding that they did not warrant the security of their premises but that they impliedly contracted (*a*) to take due care that their premises should be reasonably safe for persons using them in the customary manner and with reasonable care, and (*b*) to use reasonable care to prevent damage from unusual danger of which they knew or ought to have known, and that the plaintiff on his part impliedly contracted that he would accept such risks incident

(1) [1933] 1 K.B. 205, 213.

to the entertainment as any reasonable spectator could have foreseen.

In our opinion these propositions must be taken to be now established, and the authorities on which they are based will be found in the judgments of the Court of Appeal in *Hall's Case* (1).

I will refer to one only, *Tournier v. National Provincial & Union Bank of England* (2), in which Lord Atkin, then Atkin, L.J., says at p. 483: "The "question of what terms are to be implied in a contract "is a question of law."

We accept the law so stated, and applying it to this case, we hold that there must be some terms implied in the contract where you simply pay your green fee and walk on to the first tee.

In *Comptoir Commercial Anversois v. Power, Son & Company, Re* (3), at p. 899, Scrutton, L.J., says: "The Court, and not the jury, are the tribunal "to find such a term; they ought not to imply a term "merely because it would be a reasonable term to "include if the parties had thought about the matter, or "because one party, if he had thought about the matter, "would not have made the contract unless the term "was included; it must be such a necessary term that "both parties must have intended that it should be a "term of the contract and have only not expressed "it because its necessity was so obvious that it was "taken for granted."

The first term to be implied in the contract in this case is that the Club were to take due care that their premises would be reasonably safe for persons using them in the customary manner.

The plaintiff's argument, however, went much beyond this and claimed that the Club owed a duty to the plaintiff to provide him with a course which was free from danger and that their failure to do so amounted to negligence, and the design of the course and its user were both relied on as together constituting the negligence.

(1) [1933] 1 K.B. 205.

(2) [1924] 1 K.B. 461, 483.

(3) [1920] 1 K.B. 868.

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The questions which the Attorney General asked to be left to the jury show what were the precise acts of negligence on which the plaintiff wished the jury to be invited to find a verdict for the plaintiff :—

(1) Was Samuel Carlisle, junior, negligent ?

(2) Was the *user* of the eighth tee dangerous to persons on that portion of the seventh green on which the plaintiff was struck ?

(3) Did the Cliftonville Golf Club, Limited—

(*a*) know or (*b*) ought they to have known that the *user* of the eighth tee was dangerous to persons on that portion of the seventh green on which the plaintiff was struck ?

(4) Was the Cliftonville Golf Club, Limited, negligent ?

Questions (2) and (3) appear to us to be in conflict with the plaintiff's statement of claim. They were not left in this form by the Lord Chief Justice but we refer to them as showing that at the close of the case the plaintiff's counsel apparently appreciated the fact that it is the user that is or may be dangerous and not the course itself. This does not appear to have received very careful consideration at the trial although it is a matter which goes to the root of the liability of the Club against whom a verdict of negligence has been found, not in respect of the user of their course but in respect of its design and construction.

Now the fact is that no golf course is dangerous *per se*, unless it contains something in the nature of a trap or some unusual or concealed danger. Danger only arises in the playing of the game and from the carelessness or ignorance of the players. No doubt some courses require more care by the players than others but whenever there is an accident it arises from the acts of the players themselves, and it cannot in our opinion be successfully contended that because one course calls for a high degree of care in those who play over it if they are to negotiate it without causing injury to other players, while another course can be negotiated with the minimum amount of care, it

follows that the first must be negligently constructed and the other not. The evidence of the experts in this case show that the construction of courses differs widely in practice as one would expect, seeing that one course may be situated in a confined space in a city, as the Cliftonville course is, whereas another may be far away in open spaces where the available ground is practically unlimited.

We do not think therefore that a course can be said to be negligently constructed merely because a green and a tee are in such proximity that it is possible from the tee to strike a person standing on the green, and it is plain from the evidence that to so hold would set up a standard of perfection which is not aimed at by those who construct golf courses nor one expected by those who play on them, even if it were possible of attainment without drastic changes in the game, and any such rule would impose serious limitations on the places where it can be played.

The course is safe if properly used but the players may be dangerous. The club constructs the course and says to the players: "You can play on paying "the appropriate green fees or subscription." It does not warrant the skill or prudence of any player, and their want of skill or their imprudence are risks of the game which every player takes as an implied term of the contract between himself and the club, though he may possibly have a remedy against a fellow-player by whom he is injured under circumstances which his fellow-player cannot justify—as in *Cleghorn v. Oldham* (1).

Through the whole trial of this case no clear distinction appears to have been drawn between the dangers of the course and the dangers of the game. Sidney Fairweather, one of the plaintiff's witnesses, says: "Driving from front half of eighth tee there is "definitely danger to persons on seventh green from "badly played shot. I would not play from front of "eighth tee with persons on added four yards of "seventh green." The witness is here dealing with the risks of the game, for he assumes that when playing

(1) 43 T.L.R. 465.

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he would be aware of the presence of persons on the green, but he goes on to say: "This danger could be "prevented. I would change position of eighth tee "and put it to left of seventh green." Here he is dealing with a danger of the course, and he assumes that they are the same thing; but it is clear that if the player is aware that there are persons on the seventh green and elects not to play while they are there, which is his obvious duty, there can be no danger and the eighth tee can safely remain where it is.

On cross-examination by Mr. Black for the Club, this witness says: "On well-known golf courses there "are particular places where exposed to risk of being "struck by a freak shot," and he then gives a number of instances of places on other courses where there is said to be a risk of being struck, beginning with the Cross at the seventh and eleventh holes on the Old Course at St. Andrews, the Royal County Down course, his own course at Malone, Knock and Belvoir, these three courses being in Belfast, Donaghadee and Portmarnock in County Dublin, and the purport of his evidence is that on all these courses there are holes, or perhaps it is more accurate to say places, where lines of play converge so closely that players playing different holes may strike each other, not by freak shots but by ordinary shots, that is, unless the players observe the elementary rules of safety and determine who is to have the right of way before they play their shots.

This witness summarises his own evidence by saying: "In courses of United Kingdom we find "dozens of cases where green and tee in similar "relative position to those at Cliftonville including "best courses and no wire netting protection or "notices."

The plea that the Club were negligent in failing to provide wire netting or other protection was negatived by the jury—Answer 4 (*c*)—and is therefore out of the case.

The other professional witness called for the plaintiff, Herbert Fitzhugh, professional to the Knock Club, corroborates Fairweather. He says: "Agree

" with Fairweather dozens of courses (best in Kingdom) " where tee and green similar without wire or notices."

This evidence given by the plaintiff's witnesses establishes that the lay-out of the seventh and eighth holes on the Cliftonville course presents no features which cannot also be found on numbers of other courses, and that it is not unusual nor a departure from general and approved practice. This lay-out cannot therefore be said to be negligent. See *Vancouver General Hospital v. McDaniel and Anor.* (1), per Lord Alness, at p. 56 and p. 57, nor is there any evidence to show that these holes are not reasonably safe for persons using them in the customary manner.

There being, as we therefore hold, no evidence of negligence on the part of the Club in the design and construction of its course, and the evidence being that this accident was due to the act of Carlisle and not to any defect in the course, the plaintiff's case against the Club fails unless the Club are responsible for the act of Carlisle.

The jury have found that Carlisle was not negligent and this finding has not been challenged and must be accepted, though we find great difficulty in understanding how it was arrived at, and the Lord Chief Justice says in his report of the trial that if he had been trying the case himself he has little doubt that he would have found a verdict in favour of the Club and against Carlisle.

But whether Carlisle was negligent or not, it was a shot struck by Carlisle that injured Potter, and the Club cannot in our opinion be made liable for the consequent damage.

We hold that the implied terms of the contract between the Club and Potter were that Potter was to take the course as he found it, provided it presented no unusual dangers or traps, and that he accepted the risks of the game, one of these being that he might be hit by some other player, and we are satisfied that these are necessary and obvious terms that both parties must have intended to be part of the contract between them.

(1) 152 L.T.R. 56.

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It is also pleaded in paragraph 3 (*d*) and (*c*) of the statement of claim that the Club were negligent in extending the seventh green further into the line of play from the eighth tee in spite of warnings and with knowledge of the danger thereby created, and the jury have found for the plaintiff on this plea—Question 4 (*d*). The witness Fairweather says it was altered and a bit put on the back of it, and John Scott Henderson, the convener of the Greens Committee of the Club, says that: "Between nine "and ten yards put on to green; work completed "about October, 1936," and later: "From 1923 "always been green in position of seventh. Two-"thirds green always in same position. Never heard "suggestion that addition was dangerous. Never "suggested to me there was any danger. I have "played regularly and thousands of others. Seen "competitions with galleries on edge of fairway "both before and after enlargement of green. This "is only accident at this hole." No evidence of the warnings or knowledge pleaded in paragraph 3 (*e*) of the statement of claim was given at the trial, and no question was put to the jury in respect of either of these matters, but they were asked—Question 4 (*d*)—whether the defendant company was negligent in altering seventh green by extending same and they answered "Yes" and say that the plaintiff's injuries were caused or contributed to by such negligence. It was undoubtedly extended, and the question now is whether this fact supports the findings of the jury. We are of the opinion that it does not. What has been said about this green applies to it as it is now and so does the evidence given at the trial, and none of the witnesses have said that it was safe before it was extended. The extension had nothing to say to this accident, which, as we have already held, was an accident arising out of the playing of the game and was not caused by the position of this green.

If this be correct, then the defendant Club were not guilty of any negligence in the lay-out of the course unless there was some unusual danger peculiar to these two holes which would not be apparent to the

players and therefore might be in the nature of a trap. There was an attempt at the trial to establish a case of this kind which we will deal with later, but apart from this further case we hold that the Club was not guilty of any negligence in the lay-out of the course, and that this accident occurred not as a result of any negligent act on the part of the Club, but arose from the acts of the players and was one of the risks of the game which the plaintiff impliedly accepted as between himself and the Club when he paid his green fee and received the ticket which entitled him to play.

We now come to another element imported into this case during the trial to which the jury undoubtedly attached great weight, and upon which we think they must have decided the case. In the statement of claim it is pleaded that the Club were negligent in the construction, management and control of their links, and five heads of particulars are given. I paraphrase them :—

(*a*) Having the eighth tee in close proximity to the seventh green.

(*b*) Failure to exhibit notices warning players on the eighth tee of the danger of playing a shot therefrom while other golfers are still upon the seventh green.

(*c*) Failure to provide wire netting or other screen.

(*d*) In altering the seventh green by extending the same into the line of play from the eighth tee.

(*e*) In carrying out the last-mentioned extension in spite of warnings and knowledge of the danger thereby created.

(*e*) was not left to the jury as there was clearly no evidence to support it. The jury answered (*c*) in the negative, and (*a*), (*b*) and (*d*) have been dealt with.

No other acts of negligence were pleaded against the Club.

Further and better particulars of the negligence pleaded were called for and duly given. Paragraph seven of these further particulars is as follows :— "See the statement of claim. The said golf links "were constructed in such a way that a player striking "a golf ball from the eighth tee in the direction of the

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"eighth green struck the ball across portion of the "seventh green. The design and construction of the "golf links was such that a right-handed player "might very readily pull his shot on to the seventh "green and a left-handed player who struck his ball "inaccurately would drive his shot on to and across "portion of the seventh green. *The line of play* "*from the eighth tee to the eighth green was so close to* "*the seventh green as to be a danger and a nuisance* "as the defendants well knew or ought to have known. "The golf links were so designed and constructed "that there *was not any barricade* or *protective device* "between the eighth tee and the seventh green nor "was any notice or warning given or exhibited to "players on either the seventh green or the eighth "tee."

These particulars covered nuisance which was pleaded as well as negligence, but the jury having negatived nuisance we are now only dealing with negligence.

Neither in the statement of claim nor in these particulars is there any reference to any danger on the course which could not be seen by the players, or to anything in the nature of a trap. But at the trial, Mr. Lowry, who appeared for Carlisle, the other defendant, cross-examined Adam Dobson, the first witness for the plaintiff, as to a bush which is shown on a map prepared by this witness to the left of the eighth tee and about midway between the eighth tee and the seventh green in order to show that Carlisle's view of the seventh green was obscured when he played the shot that struck Potter. These bushes are shown as covering a very much wider space on the second map prepared by the witness, Thomas Purdy, called for Carlisle.

It is impossible to say from these maps or from the evidence of the two surveyors to what extent these bushes act as a screen obscuring the vision which a player on the eighth tee would have of other players on the seventh green if the bushes were not there.

In his cross-examination Dobson says: "Two-"thirds back from front of tee see nothing of green so

"persons on tee might see no one on green except "through saplings." And in answer to the Lord Chief Justice, he said: "If two-thirds back on tee "one could see nothing of green to right of bush "but could have interrupted view through saplings "to left."

Thomas Purdy, for Carlisle, says on cross-examination by the Attorney-General: "Standing on tee where "pointed out by Carlisle I could see one yard of "green clearly and another yard obscured in part. "Man would be visible for the two yards. Bushes "not intended on map to be impenetrable." Carlisle says that when he played the shot, "Tee-box two-"thirds of way back."

Wilson, the plaintiff's partner, says in answer to Mr. Porter, for Carlisle: "I know bush and saplings. "There might be more than one bush. As far as I "remember you can see part of seventh green when "back on eighth tee." He does not suggest that the presence of these bushes and saplings was a source of danger, and Fitzhugh, also the plaintiff's witness, says in answer to Mr. Porter: "Thorn bush quite "thick, can see through it. Might be other very "small bushes." And in answer to Mr. Beattie for the Club: "I do not consider that the bush or saplings "increase danger, they may reduce the danger."

Mr. Kidd, a witness for the Club, says in cross-examination, probably by the Attorney General, though this is not stated: "I would remove the "trees as at Portmarnock. They increase danger for "persons who would look and can't see." And finally, Mr. Simpson, a well-known golf architect, says on cross-examination, also probably by the Attorney General, for the plaintiff: "I regard the "bushes as reducing danger. I like the bushes "there."

Now this element of danger was imported into the case by counsel for Carlisle by way of defence and as an excuse for his having played while the plaintiff was on the seventh green. It is as if Carlisle were to say: "I was not able to see Potter owing to "the bushes and I played my shot in ignorance of "his presence on the seventh green."

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He says in his direct evidence : " When I struck ball " Potter was not visible," but he does not say that he played in ignorance of Potter's presence on the seventh green, and in fact he had seen Potter walking on to the green and either knew or should have known that he was there.

We are, therefore, of opinion that on the evidence it is not shown that the bushes had anything to say to the accident or that they were a trap into which Potter and Carlisle fell, Potter by going on to the seventh green in ignorance of the danger from persons on the eighth tee, and Carlisle by driving from the eighth tee in ignorance of the presence of Potter. Even if the existence of such a trap could be spelled out of the evidence it would be manifestly unfair to allow a verdict based upon it to stand as against the Club when it was not pleaded nor relied on in the particulars nor put to the jury. No amendment of the pleadings was asked for by counsel for the plaintiff, and question No. 4 (*a*) : " Were the " defendant company negligent in (*a*) the design and " construction of the said links," and the answer, " Yes," must, in our opinion, be confined to the negligence as alleged by the plaintiff in his statement of claim and in his most specific particulars, and which alone was relied on by the Attorney General in the questions which he asked to have submitted to the jury at the close of the case, and the finding cannot be supported by matters introduced by the other defendant in an attempt to throw the blame for the accident on to the Club.

The Attorney General in argument relied on the plaintiff's case as at first pleaded : The close proximity of the seventh green and the eighth tee, the failure to exhibit warning notices, and the extension of the seventh green, and he also adopted the view of the jury which was arrived at altogether apart from the case submitted to them.

At the end of their findings they attached the rider set out above.

From this rider it would appear that the jury, who at their own request had viewed the course, had ideas of their own about its dangers, and that their answers

to Question 4 (*a*) and (*d*) were founded upon matters which were not relied on by the plaintiff or put to them by the learned judge, but which enabled them to absolve Carlisle and find a verdict against the Club.

The plaintiff cannot rely on this new matter imported into the case for the first time by the verdict of the jury. If this be a trap or unusual danger within *Indermaur v. Dames* (1), it should have been pleaded, and if pleaded, evidence would undoubtedly have been produced to rebut it, and we hold that the plaintiff cannot rely on it now.

Further, there is in our opinion no evidence to support the finding that this alleged trap caused the accident, all the evidence showing that Carlisle saw Potter and knew that he was on the seventh green when Carlisle played the shot that injured him.

The Lord Chief Justice should have acceded to the request of counsel for the Club and withdrawn the case against the Club from the jury on the grounds that when the plaintiff paid his green fee and received his ticket, he impliedly agreed to take the course as he found it provided it was free from unusual dangers or traps, and to accept the risks of the game as between himself and the Club, and that the injury he received was due to a risk of the game and not to any negligent design or construction of the course.

The verdict and judgment against the Club must be set aside and the appeal allowed with costs.

Solicitors for the appellants, The Cliftonville Golf Club, Ltd.: *Martin H. Turnbull & Co.*

Solicitors for the plaintiff and respondent: *Bigger & Strahan.*

J. McC.

(1) L.R. 1 C.P. 274.

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## GALLAGHER v. YOUNG (1).

Jan. 20, 27. *Negligence—Application for liberty to increase lodgment—First lodgment made with denial of liability—Defence not delivered at date of application—Right of defendant to make second lodgment—Whether leave of Court necessary—R.S.C. (N.I.), 1936, Order 22, r. 1 (1)—R.S.C. (England), 1883, Order 22, r. 1 (1), r. 2 (1).*

The defendant in an action for negligence applied under Order 22, r. (1), to the court for an order giving him liberty to increase the lodgment of £15 made by him by the sum of £60. The lodgment of £15 was made with a denial of liability on the same day upon which an appearance was entered.

The plaintiff's solicitor refused to consent to an application being made to the court for liberty to increase the lodgment.

*Held*, by Andrews, L.C.J., that as issue had not been joined the defendant was entitled without leave of the court to make an increased lodgment provided he served a notice of such further lodgment upon the plaintiff.

MOTION for an order that the defendant in an action for negligence in driving a motor car should be at liberty to increase the lodgment of £15 made by him by the sum of £60.

The lodgment of £15 was made with a denial of liability, on the same day upon which an appearance was entered. It was made under Order 22, r. 1 (1), which provides that in any action for . . . damages . . . the defendant may at any time up to joinder of issue, upon notice to the plaintiff, or may afterwards by leave of the Court, pay into Court a sum of money in satisfaction of the claim.

The reason given for wishing to increase the lodgment was the discovery by means of an X-Ray photograph of the fracture of one of plaintiff's ribs which had not been discovered at the date of the lodgment. Prior to this it was understood by the defendant, his advisers

(1) In the King's Bench Division before Andrews, L.C.J.

and doctor, that the plaintiff was not suffering from anything worse than bruises.

The money lodged was not accepted by the plaintiff and a statement of claim was duly delivered on 29th November, 1938.

At the time of the application no defence had been delivered. On 12th January, 1939, the defendant's solicitor wrote to the plaintiff's solicitor requesting him to consent to an application being made to the Court for liberty to increase the lodgment, so that the application might be made *ex parte*. The plaintiff refused to consent, and the defence was asked for without further delay. The defendant then brought his application.

*Jones*, for the defendant :—

A sum of money may be paid into Court in accordance with the provisions of Order 22, r. 1. There is nothing to show that the words " a sum of money " bind the defendant to make his lodgment by means of one payment and one payment only. If such were the case, great injustice might be done to the defendant, should further injuries sustained by the plaintiff come to light after the time that the lodgment had been made. In the present case not even the plaintiff's doctor was aware of the presence of a broken rib, and this fact was only discovered by the plaintiff's advisers after the lodgment was made.

*McSparran*, for the plaintiff :—

Such rights of lodgment as the defendant had were the rights given by the Rules, either the Rules existing prior to 1936, or the Rules which came into operation in 1936.

Under Order 22, r. 1, of the old Rules money might have been paid into Court at any time before delivery of defence, or at time of delivery of defence. This may be done up to joinder of issue. Nowhere in the Rules is it provided that a lodgment may be amended either by increasing or decreasing the amount, and the

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right of lodgment is not a matter of course, but only exists by virtue of the Rules.

If a lodgment can be increased once prior to joinder of issue, it may be increased *ad infinitum* which would lead to an absurdity.

A lodgment is not a pleading and the Rules applicable to amendment of pleadings are not relevant to amendment of lodgments.

The application should be refused.

*Cur. adv. vult.*

ANDREWS, L.C.J.

ANDREWS, L.C.J. : The defendant in this case applies to the court for an order that he be at liberty to increase the lodgment of £15 made by him in this action upon 14th November last by the sum of £60. The lodgment of £15 was made, with a denial of liability, on the same day upon which an appearance was entered. It was made under the new Rule, Or. 22, r. 1 (1), by which, so far as is material, it is provided that in any action for . . . damages . . . the defendant may at any time up to joinder of issue, upon notice to the plaintiff, or may afterwards by leave of the court, pay into court a sum of money in satisfaction of the claim. The reason assigned for wishing to increase the lodgment is the discovery, by means of an X-Ray photograph, of the fracture of one of plaintiff's ribs which was not known of at the date of the lodgment. Prior to this it was understood by the defendant, his advisers, and doctor that the plaintiff was not suffering from anything worse than bruises.

The money lodged was not accepted by the plaintiff, and a statement of claim was duly delivered on 29th November.

Unsuccessful negotiations for settlement caused delay, and no defence has yet been delivered. On 12th January, 1939, the defendant's solicitor wrote to the plaintiff's solicitor requesting him to consent to an application being made to the court for liberty to increase the lodgment so that the application might be made *ex parte*. Such consent was refused on the following day, and the defence was asked for without further delay. Hence this motion.

Two questions have arisen for determination :— (1) The right of a defendant to make a second lodgment ; and (2) the necessity for obtaining the leave of the court to enable him to do so.

In regard to the first of these questions, I may say that I am much influenced by the consideration that the amendment of the rule was obviously effected in order to facilitate, not to impede, the making of lodgments. Now under the old practice when a payment into court was set out in and formed part of a defence, the amount lodged, like any other plea, could have been altered with the leave of the court. I am convinced that it never was intended by the new Rule to alter this power so as to make a lodgment final and conclusive—incapable of any modification whatever in the light of new circumstances such as those which exist in the present case.

This is the construction placed upon the Rule by the editors of *The Annual Practice* (1939 Edit.) when, referring (at p. 397) to English Order 22, r. 1 (1), which in all respects material to this first question is identical with our rule, they state : " It is presumed " that a defendant may increase his payment into " court at any time provided he serves a fresh notice " of the fact upon the plaintiff." To the like effect is the opinion expressed (at p. 367) in the 1939 Edition of the *Yearly Supreme Court Practice*, where it is stated : " If the defendant desires to increase his " payment into court it would appear that he can do so " by a further notice." All doubt on the matter, however, is removed by the construction placed on the English r. 1 (1) by the English rule-making authority when in the year 1936 they amended rule 2 (1) of the Order, which empowers the plaintiff to take out the money so lodged by the defendant. Into that rule, which authorised withdrawal within seven days of the receipt of the notice of payment into court, were introduced the words " or where more than one " payment into court has been made, within seven " days of the receipt of the notice of the last payment " into court." The footnote in *The Annual Practice* to this amendment of the rule reads : " The defendant

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"being at liberty to increase his payment in from "time to time these words were inserted in the rule "(in 1936) to provide for the contingency." The *Yearly Practice* note again is to the like effect. It is true that our corresponding rule, Or. 22, r. 3 (1), has never been amended as the English rule has been, but this omission cannot of course affect the true construction of rule 1 (1).

I turn now to the second question, upon which I have come to the clear conclusion that there is no necessity whatever for obtaining the leave of the court to the making of such increased lodgment. It is not to be found in our Order 22, r. 1, under which the necessity for the court's leave only arises when a defendant desires to pay money into court after joinder of issue. The very existence of this provision negatives, in my opinion, the necessity for obtaining leave before such joinder. It is suggested that the court's leave is required on the ground that increasing the amount of a payment into court is in reality an amendment of pleadings. In my opinion that is not so. The notice served on a plaintiff with a lodgment made under Or. 22, r. 1, is not a pleading. If there were any doubt upon this point it must be removed by the wording of English Order 22, r. 6, by which it is provided that no statement of the fact that money has been paid into court under the preceding rules of the order shall be inserted in the pleadings. This rule clearly excludes a notice of lodgment from the category of "pleadings." Counsel for the defendant suggested that the court had an inherent jurisdiction to give leave to amend the notice of lodgment. That is not so. There is no necessity for any such jurisdiction which can be exercised *ex parte* by the defendant without the aid of the court.

For the reasons stated I am of opinion that the defendant's motion was needlessly brought. As such it was irregular and must be refused. As the motion was, however, opposed by the plaintiff on a wholly different ground to that on which he has succeeded, namely, that no second payment into court could be made even with the leave of the court, I consider that

the proper order as to costs is that the plaintiff's costs be made costs in the cause, whilst the defendant will abide his own costs.

Solicitor for the plaintiff : *D. P. Marrinan.*
Solicitor for the defendant : *J. Morris McKee.*

J. M.C.

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Dec. 15, 20.

## IN RE GEARY. SANDFORD v. GEARY (1).

*Practice—Order in Chambers—Appeal to Court of Appeal—Special Leave—Judicature Act (Ireland)*, 1877 (40 & 41 *Vict.*, *c.* 57), *section* 54—*Administration—Charge by Executrix on Specific Asset—Charge subsequent to Testator's Death—Right to Administration—Subrogation.*

Only in very exceptional circumstances will an appeal from an order made in Chambers be heard by the Court of Appeal unless it is made up as a Court order.

A testator bequeathed his house, farm and all his other property to his wife, the defendant, directing her to use it for her own support and the benefit of the children and provided for the allocation of the property by her amongst her children at her decease. The defendant executed a charge for £150 in favour of the plaintiff expressly as executrix and personal representative, in respect of money declared to be required by her for the purposes of the administration of the estate. The plaintiff brought an originating summons before the Judge sitting in Chambers to raise the amount of the charge. The defendant appeared in person, and the Judge having heard Counsel for the plaintiff, the defendant not objecting, amended the originating summons and made an order directing the administration of the real and personal estate of the deceased.

The defendant appealed to the Court of Appeal.

*Held*, that a right of indemnity out of the general estate of the testator existed in favour of the defendant, and that the plaintiff was entitled to be subrogated to her rights and so to claim directly against the estate, and accordingly, that the order appealed from was properly made.

*Farhall v. Farhall*, 7 *Ch.* 123, *distinguished.*

APPEAL from an order of 4th July, 1938, made by Megaw, J., sitting in Chambers directing the administration of the real and personal estate of Edmund James Geary, deceased.

The material facts are set out in the judgments.

*Black, K.C.*, and *Sheil* for the appellant :—

*MacDermott, K.C.*, and *Johnson* for the respondent :

We take the preliminary objection that the appeal from the order of 4th July, 1938, should, in the first

(1) In the Court of Appeal before Andrews, L.C.J., Best, L.J., and Babington, L. J.

instance, have been to the Judge sitting in Court. Section 54 of the Judicature Act (Ireland), 1877, provides that "Every order made by a Judge of the "High Court in Chambers . . . may be set aside or "discharged upon notice by any Divisional Court or "by the Judge sitting in Court . . . and no appeal "shall lie from any such order to set aside or discharge "which no such motion has been made, unless by "special leave of the Judge by whom such order was "made, or by the Court of Appeal."

Order 58, rule 18, provides that "Whenever under "these rules an application may be made either to "the Court below or the Court of Appeal, it shall be "made in the first instance to the Court or Judge "below."

As the order in this matter was made by Megaw, J., in Chambers, there ought to have been an appeal to the Judge in Court so that the matter might be more fully argued there before bringing an appeal to this Court.

*Black, K.C.* :—

The defendant appeared in person before Megaw, J., when the order appealed from was made and it is probable that she did not fully appreciate the nature or effect of the amendment of the summons or of the order made.

An order made by a Judge of the Chancery Division personally in Chambers may be appealed from equally with an order made by him in Court. *In re Elsom, Thomas v. Elsom* (1). In that case Jessel, M.R., said at p. 348 of his judgment: "With regard to the "general practice, I think there is nothing which binds "the Court of Appeal not to hear an appeal from an "order made by a Judge of the Chancery Division in "Chambers upon any terms it may think fit. It is "quite competent to the Court of Appeal to hear "such an appeal without any certificate of the Judge "that the case had been fully argued before him in "Chambers. The appellant would only have to

(1) 6 Ch.D. 346.

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"satisfy the Court of the fact that the Judge did not "desire to hear any further argument."

Having regard to the special circumstances of the case the Court granted special leave under section 54 of the Judicature Act (Ir.), 1877, to bring the appeal direct to the Court of Appeal.

*Black, K.C.*, and *Sheil* for the appellant :—

As the charge for £150 in favour of the plaintiff was not a debt of the testator's, but was created by his executrix after his death, and was secured by a charge on one specific asset, the plaintiff is not entitled to obtain an order for administration so as to enable him to resort to the general estate of the testator. In law there is no debt between the plaintiff and the testator.

The plaintiffs remedy is either an action at Common Law against the executrix personally or by suit to have the debt declared well charged upon the specific asset and to have the security realised.

In *Farhall v. Farhall* (1), it was held that a person cannot by contract acquire a right to prove as a creditor against the estate of the testator, though the executor has power to give him a lien on specific assets.

Mellish, L.J., said in his judgment in that case, at page 12 : "It appears to me to be settled law that, "upon a contract of borrowing made by an executor "after the death of the testator the executor is only "liable personally and cannot be sued as executor "so as to get execution against the assets of the "testator."

In *Williams on Executors* (11th Edition) the author says at page 1116 : "The remedy of a creditor of the "business for a debt incurred since the death of the "testator or intestate, is against the executor or "administrator personally and not against the estate "of the deceased, *Farhall v. Farhall* (1). And the "creditor's remedy is by action of law against the "executor and he has no right to have the estate of

(1) L.R. 7 Ch. 123.

"the deceased administered. *Owen v. Delamere* (1)."
[They also referred to *Dowse v. Gorton* (2).]

*MacDermott, K.C.*, and *Johnson* for the respondent :

The Judge had power under Order 28, rule 12, to amend the summons.

The defendant was entitled to make and did in fact make this charge as executrix and not in her personal capacity. Having pledged the assets and having made herself personally liable she was then entitled to be indemnified out of the estate.

Although at law there may be no debt between the plaintiff and the estate nevertheless when an executor is entitled to be indemnified out of the general assets of the testator in respect of a debt properly incurred by him his creditor is subrogated to his right of indemnity and is entitled to claim directly against the estate. *Re Shorey : Smith v. Shorey* (3) ; *In re Evans : Evans v. Evans* (4).

In *Moore v. McGlynn* (5), it was held that an executor, who had been authorised to carry on the testator's business and who had properly incurred liabilities to trade creditors was entitled to an indemnity in respect of such liabilities and that the creditors stood in the shoes of the executor and were subrogated to his right of indemnity and priority.

The passage in *Halsbury's Laws of England* Hailsham edition, Volume 14, page 389, which deals with this matter reads : "The remedy of a creditor for a debt "contracted after the death is against the executor "and not against the estate ; but the creditor is in "equity entitled to stand in the place of the executor "and claim the benefit of his right to an indemnity."
[They also referred to *Johnson, Shearman v. Robinson* (6).]

*Sheil* (in reply) :—

All the cases relied upon by the plaintiff are trade cases in which the executor was authorised by the

(1) L.R. 15 Eq. 134.
(2) [1891] A.C. 190.
(3) 79 L.T. 349.
(4) 34 ChD. 597.
(5) 1904 1 I.R. 334.
(6) [1800] 15 Ch.D. 548.

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testator to carry on a business. In the present case there was no direction to carry on the farm and the case is governed by the decision in *Farhall v. Farhall* (1).

*Cur. adv. vult.*

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This is an appeal from an order of Megaw, J., sitting in Chambers. On the hearing we granted special leave under section 54 of the Judicature Act to bring the appeal direct from such order to this Court ; but it must be clearly understood that it was only in the special circumstances of the case that this leave was granted. Those special circumstances were that the defendant appeared in person before Megaw, J., when he made the order appealed from on 4th July last ; and it is probable that, as her counsel has stated, she may not have fully appreciated the nature or effect of the amendment of the summons or of the order made by the learned Judge. She did not consult her solicitor until a week later. The order was not on the books until 14th July, and a copy was not obtained by her solicitor until 18th July, which was the last day upon which under Order 54, rule 20, notice of appeal to the Judge in Court from the decision of the Judge in Chambers could be served without special leave of the judge. Finally, when the matter was first brought to our notice the illness of the learned Judge made it impossible for his leave to be obtained. In my opinion the proper procedure to be followed is well established in practice. If a case has been fully argued in Chambers the learned Judge when applied to will make up his order as a Court order without further argument. If, on the other hand, it has not been fully argued the Judge should be afforded the opportunity of hearing it in court. Order 58, rule 18, shows that normally it is to him rather than to the Court of Appeal that an application should in the first instance be made.

In regard to the appeal the learned Judge's power of amendment has not been and could not be questioned (*See Order* 28, *rules* 1 *and* 12). The only submission made by Mr. Black on behalf of the defendant was that as the debt in respect of which the plaintiff claims was

(1) L.R. 7 Ch. 123.

not a debt of the testator, but was created after his death by his executrix, and was charged by her upon one specific part of his estate it was not competent for the creditor seeking payment to resort to the testator's general estate as would be the case under a general administration order. Mr. Black contended that the remedies available to such a creditor for recovery of his debt were twofold: (*a*) Against the executrix personally at common law, and (*b*) by suit to have the debt declared well charged on the specific property charged and to have the security realised. His contention is supported by the judgment of Sir W. M. James, L.J., who in *Farhall v. Farhall* (1), at pages 125-6, said: "To say that the executrix can, by "borrowing money, enable the person who has lent it "to stand as a creditor upon the estate is a position "supported by no authority and no principle. The "contract is with the executrix; there is no loan to "the estate; there is no credit given to the estate; the "credit is given only to the person who borrows, "though the money may be borrowed for the purposes "of the estate."

But in my opinion there is ample authority for the proposition that if an executor be entitled to an indemnity out of the general assets of his testator in respect of a debt properly incurred by him his creditor is entitled under the principle of subrogation to stand in his shoes and to claim directly against the estate. *Re Shorey : Smith v. Shorey* (2). He has a right to be substituted to the right of the executor to indemnity. *Re Evans : Evans v. Evans* (3). There are, no doubt, limits to this right to indemnity. Thus, where it arises in respect of a trading authorised by a testator it is limited to the assets which the testator has authorised the executors to employ in the business. So, also, if an executor is in default, not being himself entitled to an indemnity except upon terms of making good his default his creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good.

(1) L.R. 7 Ch. 123.
(2) 79 L.T. 349.
(3) 34 Ch.D. 597.

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ANDREWS, L.C.J.

No suggestion of default, however, arises in the present case.

We have here a testator who bequeaths his house and farm and all his other property to his wife, the defendant, directing her to use it for her own support and for the benefit of the children, and providing for the allocation of the property by her at her decease amongst his children. In these circumstances there was clearly an implied authorisation by the testator to carry on his farming business. We have the further fact that the charge executed by the defendant expressly as executrix and personal representative, is in respect of money declared to be required by her for the purposes of administration of the estate. Whether that phrase meant that the moneys were required for the authorised trading on the farm or for the more technical administration expenses, which are a first charge on the estate, I am unable clearly to determine on the evidence before me. It is sufficient, however, for me to say that in my opinion it is not competent for the defendant who executed such charge to contend that the moneys were not required by her to discharge expenses properly and lawfully incurred by her in administering the estate.

In these circumstances I hold that a right of indemnity out of the general estate of the testator exists in favour of the defendant, and that the plaintiff is entitled to be subrogated to her rights, and so to claim directly against the estate. The order appealed from was therefore in my opinion rightly made, and the appeal must be dismissed with costs.

BEST, L.J.

BEST, L.J. : This is an appeal by the defendant from the order of Megaw, J., made on the 4th day of July, 1938, whereby the learned judge directed administration of the real and personal estate of Edmund James Geary, deceased. The defendant is the executrix and personal representative of the deceased.

An originating summons at the suit of the plaintiff to raise the amount of a charge for £150 which had been given to him by the defendant as such executrix and personal representative came on for hearing before the

learned judge on 4th July, 1938, and after hearing counsel for the plaintiff, the defendant having appeared in person, an order was made that the originating summons should be amended and that the real and personal estate of the deceased should be administered in due course of law and it was directed that the usual accounts and inquiries should be taken and made but a stay was put upon certain of the inquiries until further order.

The defendant appealed from this order on the ground that it was made by the learned Judge without jurisdiction and is erroneous in point of law.

When the appeal was about to be opened by Mr. Black, K.C., a preliminary point was taken by Mr. MacDermott, K.C., on behalf of the plaintiff, that as the order made by Megaw, J., on the originating summons was made in Chambers there ought to have been an appeal to the judge in Court so that the matter might be more fully argued there before bringing an appeal to this Court. Having heard at some length counsel on this point we decided to hear the appeal as we were of opinion that as the learned Judge who had before him another summons for hearing at the suit of R. Moore & Co., Ltd., to raise the amount of a judgment mortgage for principal and interest to the extent of £70 5*s.* 0*d.* registered by them against the interest of the defendant in the said lands, and who saw from the folio 11005, Co. Down, affecting the said lands that the Ulster Bank, Ltd., had a judgment mortgage for the sum of £542 9*s.* 0*d.* against the same interest most probably turned the originating summons to raise the amount of the charge into one for the administration of the estate in ease of and in mercy to the defendant, so that the multiplication of proceedings might be avoided.

The circumstances of the case are very peculiar but the practice of appealing to the Court of Appeal from an order made in Chambers without having the matter first adjourned into Court is not to be approved of.

Mr. Black's argument on behalf of the defendant is that the charge of £150 made in favour of the plaintiff was not a debt created by the testator and that it was

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secured by a charge on one specific asset of the estate.

He further argued that the creditor can only resort to (*a*) a common law action, or (*b*) he must go against the specific asset charged and cannot resort to the general estate of the testator.

In support of the latter proposition he relied on the case of *Farhall v. Farhall* (1), in which it was laid down that a person cannot by contract with an executor acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets.

Mr. Black also referred to *Williams on Executors* (11th edition), p. 1616, and to the 8th edition of Bullen & Leake, p. 176, and to *Dowse v. Gorton* (2).

In this case a testator's business was carried on for about three years by his executors after his death in accordance with the provisions of the will and with the assent of the testator's creditors in the interest of the creditors as well as of the beneficaries ; it was properly carried on and it was held that the executors were entitled (in priority to claims by the testator's creditors) to be indemnified out of the testator's estate against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or changed its form since the testator's death.

In what way this case helps Mr. Black's client I am unable to see. Of course, there is no express provision in the will of Edmund J. Geary, the testator, that his farming business should be carried on by the executrix but it seems to me clear on reading the provisions of the will that such was his desire. He says : " I give " and bequeath my house and farm and all my other " property to my wife, Mary Ann Geary. I direct her " to use the property for her own support and for the " benefit of the children." Then, after giving directions about the trade or profession which the children might choose, he goes on to direct his wife to allocate the property at her decease to the children in such proportion as she may think reasonable.

(1) L.R. 7 Ch. 123. (2) [1891] A.C. 190.

It appears to me clear from these provisions that the testator contemplated and desired his business as a farmer to be carried on just as it was carried on in his lifetime. The matter does not rest there for the defendant in borrowing the money from the plaintiff expressly says that as executrix and personal representative of the deceased she requires the sum of £150 for the purpose of this administration of the estate of above-named registered owner, deceased, and she charges in favour of the lender the lands comprised in the folio 11005, Co. Down.

Mr. Black is probably right when he says : " That in " point of law there is no debt between plaintiff and " the deceased," but in my opinion it is incumbent upon us in the facts of this case to allow the defendant, the executrix of the deceased, to be indemnified by the estate of the deceased. *In re Johnson : Shearman v. Robinson* (1). That was the case of an executrix carrying on the trade of the testator by the latter's direction, but I am unable to see any difference in principle between that and the present case in which the testator if not expressly by necessary implication directed his farming business to be carried on by the defendant for the benefit of herself and the children.

In my opinion the order appealed from was properly made and should not be disturbed.



BABINGTON, L.J. : I concur with the judgments just delivered to the effect that we should hear this appeal and that there was power to make the amendment which has been challenged.

I will only add a few words upon the main point as to whether the Judge having elected to make the amendment had jurisdiction to make the order for administration.

The learned Judge had before him the will of the testator, a very inartistic document, which leaves the interest of the widow in considerable obscurity.

In the suit as originally constituted it would have been impossible to unravel all the interests or to make effective the ordinary order to raise the amount of the

(1) 15 Ch.D. 548.

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charge and he appears to have been trying to prevent further expensive litigation in this small estate and to expedite proceedings generally.

Accordingly he amended the summons and, the chargeant not objecting, made an order for administration of the estate thereby avoiding multiplicity of actions.

If there was power to make this order in a case like the present where the creditor is a subsequent creditor it was in my opinion a proper order under the circumstances. It has been argued on the authority of *Farhall v. Farhall* (1) that the judge had no power to make an order for administration at the suit of a subsequent creditor.

An examination of that case, however, does not appear to me to bear this out. The head note seems to be stated in too general terms though it makes it clear that the decision was based on the fact that the executrix had misapplied the monies advanced to her whereby she forfeited her right of indemnity against her estate and this being so it is plain that the subsequent creditors could be in no better position than their immediate debtor. But if the personal representative has a right of indemnity against his testator's estate in respect of monies borrowed by him for the purpose of the estate which right he has not forfeited the subsequent creditor can stand in his shoes as against the estate and in such circumstances can obtain an order for administration in a proper case. *In re Shorey : Smith v. Shorey* (2). Assuming that the creditor has this right must he sue the executor in the first instance before taking proceedings for administration even though he will only obtain a judgment which Bacon, V.C., described as a " fruitless judgment " in *Owen v. Delamere* (3) ? I think not.

In *Hodges v. Hodges* (4), Porter, M.R., says at page 484 : " The way the matter is worked out is this " The executors, if they carry on the business by virtue " of a direction in the will of the testator are entitled

(1) L.R. 7 Ch. 123.
(2) 79 L.T. 349.
(3) L.R. 15 Eq. 134, 138, 139.
(4) [1899] 1 I.R. 480.

"to be indemnified against the claims of creditors to "the extent of the net assets of the testator received "by them. The claim is sometimes made by the "executors. They say, we have paid the *post* creditors, "and are now entitled to an indemnity out of the assets. "The claim, however, may be made not by the "executors, but by the post creditors themselves, who "come against the assets directly, thus avoiding "circuity of action."

That appears to be what the learned Judge has done in this action and in my opinion he was perfectly entitled to do so, the money having been borrowed for the purposes of the estate and there being no suggestion that the widow had misapplied it.

The order was in ease of the widow and the estate, and the only person who could have objected to it was the plaintiff who did not do so recognising no doubt that it would in the long run be worse for himself as well as for the executrix and the estate if the amendment was not made.

Solicitors for the appellant: *Collins & Collins.*
Solicitor for the respondent: *R. M. Cullen.*

J.R.

C.A. 1939.

IN RE McQUILLAN, DECEASED. MEEGAN v. HARVEY (1).

Feb. 7, 13.

*Practice—Administration—Originating Summons—Jurisdiction—Person claiming adversely to Estate—R. S. C. (Ir.)* 1905, *Order* 55, *rules* 4 (*a*), 4 (*g*) *and* 5—*R. S. C. (N.I.)* 1936, *Order* 55, *rule* 12.

The plaintiff, who was the administrator with the will annexed of the deceased, claimed a sum of £3,772, which had been on deposit receipt in the joint names of the testatrix and the defendant and had been paid out to the defendant shortly before the death of the testatrix. The plaintiff brought proceedings by originating summons for a declaration that the said sum of £3,772 formed part of the estate of deceased, or, in the alternative, for an order for the administration of the estate; and the Judge on making an order for administration directed, in addition, that it was expedient for the purpose of the proceedings to determine whether the deceased had or was entitled at the date of her death to any interest and, if so, what interest in the said sum of £3,772. Apart from this sum the estate was nominal and the administration free from difficulty.

*Held*, that Order 55, rule 12, read in conjunction with Order 55, rule 5, does not confer jurisdiction upon the Court to determine in such proceedings a claim of this character made by a person claiming adversely to the estate.

*Fowkes v. Pascoe* 43 Ch.D. 401 considered.

THE plaintiff, the administrator with the will annexed of Mary McQuillan, deceased, brought an originating summons against the defendant for (*a*) a declaration that a sum of £3,772 on deposit receipt in the Hibernian Bank Limited, on 21st March, 1935, in the joint names of the deceased and the defendant, with interest, formed part of the estate of the deceased; (*b*) an order for payment; (*c*) alternatively, an enquiry as to what part of the personal estate of the deceased had come to the hands of the defendant; and (*d*) if necessary, an order that the personal estate of the deceased might be administered.

The defendant, who had entered an appearance without prejudice, opposed the making of an order on the ground of want of jurisdiction.

(1) Before Andrews, L.C.J., Babington, L.J., and Brown, J.

Megaw, J., made an order directing the usual accounts and enquiries in an administration suit, and providing that the testatrix's personal estate be applied in due course of administration. He further directed that it was expedient to determine the following question of fact: "Whether the deceased had or was entitled "at the date of her death to any interest and, if so, "what interest in the sum of £3,772, lodged on 31st "July, 1934, on deposit receipt in the joint names of "the said Mary McQuillan, deceased, and the "defendant." He directed that this question be determined by the Court in a summary manner, and that evidence be given as in said order provided.

The defendant appealed from this order on the ground that it was erroneous in law, and was made without jurisdiction and contrary to the rules and practice of the Court.

*Black*, *K.C.*, and *Sheil* for the defendant and appellant.

The question to be determined is whether a claim made by a person claiming adversely to the estate may be brought under Order 55 on originating summons.

Prior to the making of the new rule 12 to Order 55 no question of fact could be determined on originating summons. *In re Powers* (1), *Beamish v. Whitney* (2).

Order 55, rule 12, creates no new jurisdiction for originating summons but where an originating summons is properly brought it allows questions of fact necessary for the proper decision therein to be determined by a new procedure.

The originating summons in the present case could only purport to be brought under Order 55, rule 4 (*g*), which provides for the determination of any question arising in the administration of an estate or trust. The claim made by the defendant, however, arises outside the administration and is, in fact, made against the estate.

Questions of fact which may be determined under Order 55, rule 12, are limited to those which arise within the administration proceedings and there never

(1) 30 Ch.D. 291. (2) [1908] 1 I.R. 98.

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IN RE McQUILLAN, DECEASED. MEEGAN v. HARVEY.

has been and is not now jurisdiction to determine any question of fact as between the estate and a person claiming against the estate otherwise than in a plenary suit. *In re Bridge* (1). *In re Royle* (2). In the latter case the question which was sought to be determined on originating summons was whether a sum of £171, which the testator had handed to his widow shortly before his death, and which stood in her name at a bank, belonged to her or his estate. It was there held that there was no jurisdiction on originating summons to decide adversely to the widow to the testator's estate, this not being a question which could be decided in an administration suit. In *In re MacDermott* (3), it was held that the procedure by administration summons does not apply where there is a question arising outside the ordinary course of administration, and in *In re Giles* (4), where a mortgagee had taken out an originating summons for foreclosure or sale under Order 55, rule 5 (*a*), the Court refused to decide the question of priority between two mortgagees.

If the claim against the defendant cannot be determined on originating summons, Order 55, rule 12, does not apply as it is limited by its terms to proceedings instituted by originating summons.

[They also referred to *Herrick v. Cooper* (5).]

*The Attorney General* (*E. S. Murphy, K.C.*), and *Maginess* for the plaintiff and respondent.

The plaintiff was clearly entitled to ask the Court for an order for the administration of the estate. The question as to whether or not the money on deposit receipt is part of the estate arises in the ordinary course of administration and it is a proper question to be determined in administration proceedings. In *Fowkes v. Pascoe* (6), the Court made an order for administration where a bill was brought for administration of the estate of the deceased although the principal object of the suit was to determine whether the defendant was entitled to certain stock which he claimed as a gift.

(1) 56 L.J.Ch. 779.
(2) 43 Ch.D. 18.
(3) 29 L.R.I. 12.
(4) 43 Ch.D. 391.
(5) [1899] 1 I.R. 321.
(6) L.R. 10 Ch. 343.

The cases relied upon by the defendant were cases in which there were disputed matters of fact and could not, therefore, be determined on originating summons.

In *In re Davies* (1), North, J., held that the Court had jurisdiction on originating summons to decide questions arising between executors, administrators, or trustees on the one hand and the person, be he creditor, or devisee, or next-of-kin, who sets up the claim on the other.

The question as to the ownership of the money on deposit receipt is an issue of fact which the learned Judge was clearly given jurisdiction to determine under Order 55, rule 12.

The alteration in the rules was made with the express object of cheapening proceedings and enabling matters involving disputed questions of fact to be decided on originating summons.

The order appealed from was made, not under rule 4 (*g*) but under rule 5. Rules 5 and 12 of Order 55 when read together enable proceedings to be brought on originating summons where formerly it would have been necessary to bring a plenary action.

[They also referred to *In re Hargreaves* (2).]

*Black, K.C.* (in reply) :—

*Fowkes v. Pascoe* (3) does not apply to the present case. That was a plenary suit and the defendant submitted to the jurisdiction.

*Cur. adv. vult.*

ANDREWS, L.C.J.

ANDREWS, L.C.J. : This matter came before Mr. Justice Megaw on an originating summons brought by the plaintiff, who is the administrator with the will annexed of Mary McQuillan, deceased, against the defendant. It is not unimportant to note that the character in which the defendant is sued is not stated in the summons. The plaintiff sought (*a*) a declaration that a sum of £3,772 on deposit in the Hibernian Bank Limited, on 21st March, 1935, in the joint names of the deceased and the defendant, with interest, formed

(1) 38 Ch.D. 210.
(2) 43 Ch.D. 401.
(3) L.R. 10 Ch. 343.

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ANDREWS, L.C.J.

part of the estate of the deceased; (*b*) an order for payment; (*c*) alternatively, an enquiry as to what part of the personal estate of the deceased had come to the hands of the defendant; and (*d*) if necessary, an order that the personal estate of the deceased might be administered. The defendant, who had entered an appearance without prejudice, appeared by counsel on the hearing of the summons, and strongly opposed the making of an order on the ground of want of jurisdiction; but the learned Judge made an order directing the usual accounts and enquiries in an administration suit, and providing that the testatrix's personal estate be applied in due course of administration. He further directed that it was expedient to determine the following question of fact:—

"Whether the deceased had or was entitled at "the date of her death to any interest and if so, "what interest in the sum of £3,772 lodged on 31st "July, 1934, on deposit receipt in the joint names "of the said Mary McQuillan, deceased, and the "defendant."

He also directed that this question be determined by the Court in a summary manner, and that evidence be given as in said order provided.

From this order an appeal was brought to this Court on the ground that the order was erroneous in law, and was made without jurisdiction, and contrary to the rules and practice of the court.

It is admitted that prior to the amendment of our rules of Court in the year 1936 no such order could have been made upon an originating summons, as it was not competent for the Court under such procedure to determine controversial questions of fact such as would admittedly have been involved in the issue directed by the Court. The Attorney General, however, relied on behalf of the respondent upon Order 55, r. 12—an entirely new rule—which provides as follows:—"If at "any stage during the course of proceedings instituted "by originating summons it shall appear to the Court "or a Judge that the determination of some question "or questions of fact is necessary for the proper "decision or ruling as to the relief to be granted in

"such proceedings or as to any matter arising therein, "the Court or Judge may determine such question or "questions of fact either by directing the trial of issues "in regard thereto or in such other manner (whether "summary or otherwise) as may seem convenient for "doing justice between the parties; and evidence as "to the said question or questions of fact may be "given either orally or by affidavit or partly orally "and partly by affidavit as the Court or Judge may "in the circumstances consider proper." This rule, the Attorney General submitted, when taken in conjunction with rule 5 of the same Order, gave full jurisdiction to the learned Judge to make the order appealed from.

The only legal importance attached to this case is that it is the first occasion upon which this Court has been asked to construe rule 12, and to place proper limitations on its scope and operation.

After giving the matter my most careful consideration I am satisfied that Mr. Black's argument on behalf of the appellant is absolutely sound and must succeed. In my opinion it was not the intention of the Rules Committee, when adding rule 12, to empower the Court to determine questions between parties on an administration summons which, according to the settled practice of the Court, could not, in the absence of consent, have been determined in a plenary suit for administration instituted by writ of summons. The intention simply was that the Court should not be compelled to leave undecided a matter, which in other respects there was jurisdiction to determine, merely because it involved an issue of fact and the procedure adopted was by originating summons. Save as aforesaid the rule did not increase or affect jurisdiction in any way.

Let us then consider briefly the jurisdiction of the Courts in administration actions, whether instituted by originating or by writ of summons, as applicable to the present case. The Attorney General admits that the learned Judge had no jurisdiction to make the order appealed from under rule 4, not only because that rule is confined to the determination of questions

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without an administration of the estate, but also because the questions authorised by that rule do not embrace the question in this case. Rule 4 (*g*) relates to the determination of any question arising in the administration of the estate, whereas the claim made by the defendant in the present case arises outside the administration and is, in fact, made against the estate. Hence it was that the learned Attorney General relied upon rule 5 (*a*), which empowers the Court to make an order for the administration of the personal estate of the deceased.

Now nothing could be clearer than, as appears by the affidavit of the plaintiff in support of the summons, that the only question which arises in connection with the estate of the deceased upon which the assistance of the Court is required is the claim made by the defendant to the sum of £3,772 standing on deposit receipt in the joint names of the deceased and of the defendant. Apart from this sum the estate is nominal and the administration free from difficulty. It would therefore be wrong for the Court in such a case to make an order for administration unless it were perfectly clear that the Court had ample jurisdiction conclusively to determine the point in issue in such administration proceedings, and this I am clearly of opinion that it would not have unless the defendant agreed to submit to the jurisdiction of the Court, which she has consistently and emphatically refused to do.

In support of this opinion, which accords with one's knowledge of settled practice, ample authority was cited by Mr. Black. The most helpful of these cases is *In re Royle, Royle v. Hayes* (1). In this case an executor took out an originating summons asking whether a sum of £171 belonged to the testator's widow or to his estate. The widow objected to the jurisdiction and this objection was upheld in the Court of Appeal. Cotton, L.J., after referring to the fact that the summons gave jurisdiction to decide points relating to the administration of the estate—questions arising between legatees and the executor—

(1) 43 Ch.D. 18.

said that this was not a question between the executor and a legatee as such but a question between the executor and a person who holds money, which he alleges to belong to the estate of the testator, and which she alleges to be her own. The learned Lord Justice continues thus :—" In an administration suit " the regular course would have been, after directing " accounts of the personal estate, to add a special " inquiry whether this sum of money had been given " to the widow. She then, if she thought fit, could " come in and say, ' I submit to the jurisdiction, and " ' am willing to have the question tried under this " ' inquiry as if an action had been brought against " ' me.' But if she did not do so, there would be no " jurisdiction to decide adversely against her in the " administration action, that she was not entitled to " the money."

It was on the same principle that the Vice-Chancellor decided *In re McDermott, decd. Neilan v. Farrell* (1)—a case of alleged *donatio mortis causa*—holding that the question arose outside the ordinary course of administration. In my opinion this principle remains entirely unaffected by the new rule 12 of Order 55.

I have already called attention to the fact that the character in which the defendant is sued is not stated in the originating summons. This, I think, is not a mere accidental omission. In truth she is joined as a party with a twofold interest. As residuary legatee under the will of Mary McQuillan she is properly made a defendant in an administration suit. As a person making a claim against the estate of Mary McQuillan, which gives rise to the sole real issue in the case, she is wrongly made defendant in these proceedings.

I should add that in *Fowkes v. Pascoe* (2), relied upon by the Attorney General, the defendant submitted to the jurisdiction without protest of any kind, and the case is, accordingly, no authority in support of the plaintiff in the present proceedings.

The appeal must be allowed and the summons dismissed with costs.

(1) 29 L.R.I. 12. (2) L.R. 10 Ch. 343.

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IN RE McQUILLAN, DECEASED. MEEGAN v. HARVEY.

BABINGTON, L.J.

BABINGTON, L.J. : The short question to be decided in this case is whether a person in possession of property alleged to belong to the estate of a deceased can be brought before the Court by an originating summons for administration and compelled to submit to having his rights adjudicated on under Order LV., rule 12, as a question or questions of fact necessary for the proper decision as to the relief to be granted in such administration proceedings.

The plaintiff is administrator with the will annexed of one Mary McQuillan and claims that a sum of £3,772, which was on deposit receipt in the Hibernian Bank in the joint names of the testator and the defendant is assets of the testator.

It is alleged by the plaintiff that this deposit receipt was cashed prior to the death of the testator and the proceeds paid out to the defendant, who still retains them.

In order to recover this £3,772 the plaintiff has brought these proceedings by originating summons for administration, and he prays for a declaration that the said monies form part of the estate of Mary McQuillan and claims an order for payment of said monies against the defendant.

The learned Judge made an order for administration with the following addition :—

> " And it appearing to the Court that for the " purpose of these proceedings it is expedient to " determine the following question of fact, namely :—
>
> > " Whether the deceased had or was entitled at " the date of her death to any interest and if so, " what interest in the sum of £3,772 lodged on " the 31st July, 1934, on deposit receipt in the " joint names of the said Mary McQuillan, deceased, " and the defendant."

and he thereupon directed that the question be determined in a summary manner upon evidence to be taken as directed.

The defendant appeared under protest and objected that the Judge had no jurisdiction to make this order against her in these proceedings.

In my opinion, this objection was well founded.

It is conceded that prior to the rules of the Supreme Court (Northern Ireland), 1936, this order could not have been made, but it is said that Order LV., rule 12, changed this and that the Court can now determine questions of fact as against persons claiming dehors the estate if it considers it expedient to do so for the purpose of the proceedings before it, which in this case are the administration proceedings.

The defendant on the other hand claims that the questions of fact which can be decided under rule 12 are limited to those which arise within the administration proceedings, and that there never has been and is not now any power to determine any question of fact as between the estate and a person claiming dehors the estate otherwise than in a plenary suit.

I shall not go over the authorities cited further than to say that they show that under the rules as they stood prior to 1936 the defendant could only have been sued in a plenary suit. That such suit might have included a prayer for administration is immaterial, the point being that the procedure by originating summons did not apply to the claim against her and she could not have been so impleaded.

I do not understand how this can be said to have been changed by Order LV., rule 12.

If the defendant cannot be sued by originating summons, rule 12 has no application as it is in terms limited to proceedings instituted by originating summons, and this disposes of the plaintiff's argument.

The confusion arises from the assumption that the dispute between the plaintiff and the defendant is a matter arising in the administration proceedings within rule 12, and that it can therefore be dealt with as being ancillary to them, whereas it is not ancillary to any administration proceedings whether brought by plenary suit or originating summons, but is another cause of action altogether which cannot be tried on originating summons.

The appeal should be allowed and as there has been no case made out for administering this estate apart from the dispute as to the deposit receipt, the order for administration should be discharged with costs.

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IN RE McQUILLAN, DECEASED. MEEGAN v. HARVEY.

BROWN, J.

BROWN, J.: Mary McQuillan, a widow who before her death was an inmate of the County Infirmary, Castleblayney, Co. Monaghan, and who died on the 25th March, 1935, by her last will, dated the 21st day of March, 1935, devised and bequeathed the house in which she resided and all monies in the bank or otherwise to her niece, the defendant Kate Harvey, subject to the payment of £500 pecuniary legacies, including a legacy of £100 to the plaintiff, Edward Meegan.

On the 31st day of July, 1934, the sum of £3,772 had been placed on deposit in the bank in the joint names of the deceased and the defendant. On the 21st day of March, 1935, the day deceased's will was made this sum with accruing interest amounting to about £36 had been withdrawn from the bank and the plaintiff averred in his affidavit that he believed these sums had been withdrawn by the defendant. Apart from this sum of about £3,800 and the house bequeathed to the defendant, the estate of the deceased consisted of her household goods valued at £5.

The defendant claims that this sum of about £3,800 is her sole and absolute property and did not form part of the estate of the deceased.

The executors named in the last will of deceased having duly renounced, administration with the will annexed was granted to the plaintiff on the 29th July, 1938.

On the 10th November, 1938, the plaintiff issued an originating summons against defendant asking for a declaration that the aforesaid sum of about £3,800 formed part of the estate of the said deceased, for an order that defendant pay over the said sum with accrued interest to the plaintiff as administrator, alternatively for an enquiry as to what part of the personal estate has come to the hands of the said defendant and further, if necessary, for an order that the personal estate of the said deceased may be administered.

On the hearing of this originating summons the Judge ordered as a court order, the taking of the usual accounts and an enquiry, that the estate be adminis-

tered and that the question of fact as to what interest the deceased had in the said sum of about £3,800 be determined by this Court in a summary manner and that the evidence to be relied on may be given partly orally and partly by affidavit and that particulars of the matters on which the plaintiff and defendant respectively rely shall be delivered within twenty-one days.

The defendant appealed against the whole of this order asking that the originating summons be dismissed on the ground that the order was erroneous in law and was made without jurisdiction and contrary to the rules and practice of the Supreme Court of Judicature.

The argument before us dealt only with this question of jurisdiction and no reference was made at all to the merits.

Mr. Black in opening said the real question to be determined was whether an originating summons under Order 55 can be brought to determine a claim made by a person claiming adversely to the estate.

Prior to the making of the new rule 12 to Order 55 this question could not have arisen as the settled practice of the Court was that no question of fact could be determined on the hearing of an originating summons. As a consequence of this practice an estate was often put to much expense to have some, perhaps minor, question of fact arising in an administration determined. By rule 12 that practice has now been changed and the Judge has now power to determine questions of fact arising during the course of proceedings instituted by originating summons.

The whole of rule 12 is governed by its opening words: "If at any stage during the course of pro- "ceedings instituted by originating summons." These words assume that an originating summons has been properly brought, i.e., that it comes properly within the terms of Order 55, providing for the determination of certain questions. Rule 12 creates no new jurisdiction for originating summons except that it merely allows originating summons properly brought to be determined in certain cases by a new procedure. As the Attorney General said in his argument it was made

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to cheapen litigation. Mr. Black submits that the originating summons in this case could only purport to fall under rule 4 (*g*) providing for the determination of any question arising in the administration of the estate or trust. The Attorney General, on the other hand, says the originating summons has nothing to do with any part of rule 4 but is brought under rule 5 for the administration of the personal estate of the deceased, and that the determination of the outstanding estate is but an incident in the administration.

From the admitted facts it is clear that but for this question of the ownership of this sum of £3,800 there would be no difficulty in the administration of this estate. The whole trouble is the ownership of this sum and once that is determined whether for plaintiff or defendant the assistance of the Court would almost certainly not be required further.

The very form of the originating summons points to this question of ownership as being the main question and this Court has to determine whether this claim made by an administrator on the one hand that certain monies belong to the estate and by the defendant on the other hand that these monies are and were her own personal property and never belonged to the estate, is one that can properly be determined by originating summons.

I am of opinion that this matter is settled by authority. I refer to the case of *In re Royle* (1). There a deceased had on his deathbed handed his wife a sum of £171 which, in his lifetime, she put in the bank in her own name. The executor claimed this sum as part of the estate and the widow claimed it as her own personal monies. The executor brought an originating summons to have this question of ownership determined and so far it is very like the question in the present case. The Court of Appeal held there was no jurisdiction on an originating summons to determine such a matter. Cotton, L.J., p. 21. Bowen, L.J., p. 21.

The case of *In re McDermott* (2) also supports this view where it was held that the determination of the question whether monies retained by an executor

(1) 43 Ch.Div. 18. (2) 29 L.R.I. 12.

under the claim that they were the subject of a *donatio mortis causa* was not one which could be tried by originating summons.

I think the inference to be drawn from the report of *Fowkes v. Pascoe* (1), relied on by the Attorney General, is that the action there was not for administration merely but was also for a declaration. The question to be decided here was not raised or argued in that case and I prefer the very clear language of Cotton, L.J., in Royle's case (2).

Solicitors for the appellant: *Corr & O'Connor.*
Solicitors for the respondent: *R. E. Bailie & Co.*

J. R.

(1) L.R. 10 Ch. 343. (2) 43 Ch.D. 18.

K.B.D.
1938.

## BROOKE v. McCALLUM (1).

Dec. 8, 9, 12. *Summary Jurisdiction—Summons for being in possession of bovine animals—The Cattle (Import from Eire) Order*, 1938—*The Eire (Confirmation of Agreements) Act*, 1938 (1 *& 2 Geo. 6, c. 25), section 3 (3)—The Live Stock Industry Act*, 1937 (1 *Edw. 8 & 1 Geo. 6, c. 50), sections 7, 58 (1)—Validity of Order—Jurisdiction—Whether Secretary of State for Home Department, the Secretary of State concerned with agriculture in Northern Ireland —Review of decision—Declining of Jurisdiction.*

A summons was issued against J. J. It was charged against him that on 29th September, 1938, eighteen bovine animals were found in his possession at G., in the County of A. These cattle were seized as having been imported from Eire into Northern Ireland contrary to the provisions of The Cattle (Import from Eire) Order, 1938, made under the Live Stock Industry Act, 1937, and the Eire (Confirmation of Agreements) Act, 1938.

This order purported to be made under section 3 (3) of the Eire (Confirmation of Agreements) Act, 1938, which provides that: "The power of the Ministers under Part II. of the Live Stock "Industry Act, 1937, to make orders for ensuring the due making "of subsidy payments under that Act shall include power to make "orders regulating the times and places at which cattle may be "imported from Eire into the United Kingdom."

"The Ministers" under Part II. of the Live Stock Industry Act, 1937, who are empowered to make orders are defined in section 58 (1) of that Act as being: "The Minister of Agriculture and "Fisheries and the Secretaries of State respectively concerned "with agriculture in Scotland and in Northern Ireland."

At the hearing of the summons before the resident magistrate a preliminary point was made on behalf of the defendant that the Court had no jurisdiction to hear the case, the order being invalid as the Secretary of State for the Home Department was not shown to be the Secretary of State concerned with agriculture in Northern Ireland.

An application was then made on behalf of the prosecutor for an adjournment to enable the necessary evidence to be produced dealing with this preliminary point. This application was opposed on the ground that as the resident magistrate had no jurisdiction to hear the case, he had no power to adjourn.

The resident magistrate yielded to this argument and declined to adjourn the case, and held that he had no jurisdiction.

(1) In the King's Bench Division before Andrews, L.C.J., and Brown, J.

On an application to make absolute notwithstanding cause shown a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the resident magistrate, and also for the issue of a writ of mandamus directing the resident magistrate to hear and determine according to law the matter of the complaint.

*Held*, by the King's Bench Division (Andrews, L.C.J., and Brown, J.) that in holding that he had no jurisdiction to hear the case the resident magistrate must have held that the orders were invalid on the ground that they had not been made by "the "Ministers" duly authorised, and that such an order which was final and conclusive in form and character and was made without any evidence being tendered, could not stand.

The Court therefore made absolute the conditional order for both certiorari and mandamus.

CERTIORARI AND MANDAMUS.

On 14th October, 1938, a summons was issued against one John Jeffers that on 29th September, 1938, eighteen bovine animals were found in his possession at Glassdrummond, in the county of Armagh, and in the petty sessions district of Crossmaglen. These animals were seized as having been imported from Eire into Northern Ireland contrary to the provisions of The Cattle (Import from Eire) Order, 1938, made under the Live Stock Industry Act, 1937, and the Eire (Confirmation of Agreements) Act, 1938, whereby the said animals were liable to forfeiture under article 4 of that order.

This order purported to be made under section 3 (3) of the Eire (Confirmation of Agreements) Act, 1938, which provided that "The power of the Ministers "under Part II. of the Live Stock Industry Act, 1937, "to make orders for ensuring the due making of subsidy "payments under that Act shall include power to "make orders regulating the times and places at which "cattle may be imported from Eire into the United "Kingdom and making provision as to the routes to "be followed by cattle imported and as to their "detention for inspection."

"The Ministers" under Part II. of the Live Stock Industry Act, 1937, who are empowered to make orders are defined in section 58 (1) of that Act as being "the Minister of Agriculture and Fisheries and the

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"Secretaries of State respectively concerned with "agriculture in Scotland and in Northern Ireland."

At the hearing of the summons before the resident magistrate, a preliminary point was made on behalf of the defendant that the Court had no jurisdiction to hear the case, The Cattle (Import from Eire) Order being invalid, as the Secretary of State for the Home Department was not shown to be the Secretary of State concerned with agriculture in Northern Ireland; and that the order was not made in accordance with section 3 (3) of the Eire (Confirmation of Agreements) Act, 1938, and did not comply with that section.

An application was then made on behalf of the prosecutor for an adjournment to enable the necessary evidence to be produced dealing with this preliminary point. This application was opposed on the ground that as the resident magistrate had no jurisdiction to hear the case, he had no power to adjourn.

The resident magistrate yielded to this argument and held that he had no jurisdiction either to hear or adjourn the case.

The prosecutor obtained a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed, the order that had been made, on the ground that the resident magistrate was not correct in point of law in holding that he had no jurisdiction to hear and determine the matter of the complaint, and also for a writ of mandamus commanding the resident magistrate to hear and determine according to law the matter of the complaint.

The prosecutor applied to have the conditional order made absolute notwithstanding cause shown.

The *Attorney General* (*E. S. Murphy, K.C.*) and *Maginess* for the prosecutor :—

The point is whether the Secretary of State for the Home Department is the Secretary of State concerned with agriculture in Northern Ireland. The main complaint of the prosecutor was that the resident magistrate decided that he had no jurisdiction thereby apparently determining he had no jurisdiction to

entertain these summonses brought under the Cattle orders. That would mean that the orders could not operate, as summonses brought under them would have been wrongly made. There is the clearest documentary evidence that the Minister who signed those orders is the Minister concerned with agriculture in Northern Ireland.

There is some Minister of the Imperial Government concerned with agriculture in Northern Ireland. We submit that that Minister is the Secretary of State for the Home Department.

If there is a Minister concerned with agriculture in Northern Ireland the Court should take cognisance of that fact. The Home Department is concerned with Northern Ireland. This is a question of fact of which a Court should take judicial cognisance.

The Vice-Chancellor (Sir L. Shadwell) in his judgment in *Taylor v. Barclay* (1), said : " I conceive it is " the duty of the Judge in every Court to take public " notice of public matters which affect the Government " of the country."

In *Taylor on Evidence* (12th ed.), vol. 1, page 20, par. 18, it is stated that : " The Courts will judicially " recognise the political constitution or frame of their " own government ; its essential political agents or " public officers sharing in its regular administration ; " and its essential and regular political operations and " actions." We submit that this statement correctly expresses the law and applies to the present case.

The resident magistrate was wrong in holding that he had no jurisdiction.

*Black, K.C.*, and *Sheil* for the defendant :—

The Imperial Parliament had left it rather vague and general who the Minister concerned with agriculture in Scotland and Northern Ireland was. It was suggested that it might mean one Secretary of State or another. The Act said : " The Secretary of State " concerned with agriculture in Northern Ireland." Certain persons are described " as Ministers." The Act does not explicitly say : " the Secretary of State

(1) 2 Sim. 213, 221.

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"for the Home Department." One of the first proofs was for the prosecutor to show that he came properly into Court. The Court was not bound to have judicial knowledge as to who the Secretary of State concerned with agriculture in Northern Ireland was.

This is a matter to be ascertained by evidence.

The Interpretation Act, 1889, section 12, provides that "the expression 'Secretary of State' shall mean "one of Her Majesty's Principal Secretaries of State "for the time being."

It is one of the necessary proofs to show who is the proper Secretary of State for the Home Department.

[ANDREWS, L.C.J.: If proof was required as to who was in charge of agriculture in Northern Ireland it would mean that legal proof would have to be produced at every petty sessions court in Northern Ireland.]

*Taylor v. Barclay* (1) decided not that the Courts will take judicial notice, but that the matter was to be ascertained by inquiry. On this question we rely on the decision in *Ferguson v. Benyon* (2).

Who the Minister concerned with agriculture in Northern Ireland is, is a question of fact and falls to be determined by evidence.

The Court could not grant a mandamus to hear and determine where the refusal to hear and determine was not based on a matter of law but on a matter of fact.

[BROWN, J. You say that the meaning of the order was "jurisdiction not proved" not "no jurisdiction."]

That would be the more accurate form.

[ANDREWS, L.C.J. That would make all the difference in the form of the proceedings.]

The passages quoted from *Taylor on Evidence* are not relevant to the present case.

The law is correctly stated in *Halsbury's Laws of England* (Hailsham ed.), vol. 9, page 766, par. 1298: "If an inferior tribunal on the hearing of a preliminary "objection comes, on the evidence before it, to a con- "clusion of fact which justifies such objection, and in "consequence dismisses a matter brought before it, "no mandamus will lie commanding that tribunal to

(1) 2 Sim. 213. (2) I.R. 1 Eq. 475.

" hear and determine the matter, but it is otherwise if " the objection turns upon a question of law."

The prosecutor had not discharged the onus to prove jurisdiction.

The resident magistrate in deciding that he had no jurisdiction was deciding a question of fact.

It is not as if the matter were *res judicata*.

We rely on *The Queen v. The Justices of Kesteven* (1).

It is well settled that mandamus will only lie where there is a question of law involved.

In *The Queen v. The Justices of Flintshire* (2), a mandamus was refused because the justices had decided on a question of fact and their decision was therefore final.

In *The Queen (Portadown Commissioners) v. Singleton* (3), it was held that the Court will not grant a mandamus against a magistrate unless it appear that there was some mistake in point of law in his decision.

Agriculture is not a reserved service and the Secretary of State for the Home Department has no jurisdiction to make the order. There was no refusal by the resident magistrate to hear evidence.

We have never disputed that this order made under The Eire (Confirmation of Agreements) Act, 1938, was made by the persons named in it.

It is a rule of construction that effect must be given to every clause in an Act of Parliament. It is for the prosecutor to show that this order was made by the person who was intended to make it by the Act of Parliament.

Section 58 (1) of the Live Stock Industry Act, 1937, seems to suggest that the order must be made by two individuals.

We submit that the application to make this order absolute should be refused.

*Maginess* (in reply):—

In the present case the Court made an order of " No jurisdiction." That finding distinguishes the

(1) 3 Q.B. 810.
(2) 16 L.J. (M.C.) 55.
(3) 8 Ir. Law Reports 21.

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case from those that have been cited on behalf of the defendant.

We rely on the words used by Coleridge, J., in his judgment in *The Queen v. Brown* (1).

We submit that in the present case the resident magistrate did not adjudicate.

The office of Secretary of State is one, and the division of its duties is merely one of convenience.

Although agriculture is not a reserved service, yet trade of which agriculture is merely a division, is a reserved service.

The resident magistrate did not make the proper order in this case and certiorari and mandamus both lie.

*Cur. adv. vult.*

ANDREWS, L.C.J.

ANDREWS, L.C.J., delivered the judgment of the Court as follows :—

On 14th October last a summons was issued against one John Jeffers that on 29th September eighteen bovine animals were found in his possession at Glassdrummond, in the County of Armagh, which were seized for that they were imported from Eire into Northern Ireland contrary to the provisions of The Cattle (Import from Eire) Order, 1938, made under The Live Stock Industry Act, 1937, and the Eire (Confirmation of Agreements) Act, 1938.

The proceedings were based on the Order of 1938 referred to in the summons, and the validity of this order was, accordingly, an essential part of the complainant's case. There were in fact two such Orders, dated 17th May, 1938, and 18th August, 1938, respectively ; but it is to the first of these that special reference was made in the arguments before us, and to which alone I need refer in this judgment.

The validity of the Order depends (amongst other matters) upon its having been made by the persons authorised by Statute to make it. As appears by the recitals to the Order it purported to be made under section 3 (3) of the Eire (Confirmation of Agreements) Act, 1938, which provided that the power of *the Ministers* under Part II. of the Live Stock Industry

(1) 26 L.J. (M.C.) 183, 184

Act, 1937, to make orders for ensuring the due making of subsidy payments under that Act should include power to make orders regulating (*inter alia*) the times and places at which cattle should be imported from Eire into the United Kingdom. Who are "the "Ministers" under Part II. of the Live Stock Industry Act, 1937, who are thus empowered to make orders? The term is defined in section 58 (1) of the Act as meaning "the Minister of Agriculture and Fisheries "and the Secretaries of State, respectively, concerned "with agriculture in Scotland and in Northern Ireland." Both orders were in fact made under the official seals of the Ministry of Agriculture and Fisheries, the Secretary of State for Scotland and the Secretary of State for the Home Department; and it is not unimportant to note that clause 8 of the first order defines the term "the Ministers" for the purpose of that order as meaning the Minister of Agriculture and Fisheries, the Secretary of State for Scotland, and the Secretary of State for the Home Department acting jointly.

In opening the case before Mr. McCallum, the Resident Magistrate for Armagh, Mr. Best, the Crown Solicitor for the County, referred to the above-mentioned Acts of Parliament and Orders. Thereupon Mr. Sheil, who appeared for the defendant, stated that he had a preliminary point to make, and it was agreed that he should do so before going into any evidence. Whilst the precise terms of Mr. Sheil's submission are somewhat in issue, it may be accepted that he contended that the Court had no jurisdiction to hear the case, the order being invalid as the Secretary for the Home Department was not, or at any rate was not shown to be, the Secretary of State concerned with agriculture in Northern Ireland.

This was not only a preliminary but also a technical point which in no way affected the merits of the case. No notice had been given in advance that it would be raised, and it was not unnatural in the circumstances that Mr. Best was unprepared to meet it with the requisite evidence. He applied for an adjournment which was opposed, it is alleged, on the ground that as

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the Resident Magistrate had no jurisdiction to hear the case he had no power to adjourn. Ultimately, the magistrate, in my opinion unfortunately, declined to adjourn the case on what appears to me to be the unsustainable ground urged by Mr. Sheil, and he made an order in the terms "No jurisdiction." The motion to this Court is to make absolute a conditional order of certiorari to quash that order and of mandamus to the magistrate to hear and determine the matter according to law. In support of the motion for a conditional order and also of the present application, affidavits were filed setting out clearly that the Ministry of the United Kingdom directly concerned with agriculture in Northern Ireland is the Home Office, and that the Secretary of State for the Home Department is the Secretary of State who is concerned with agriculture in Northern Ireland. Concrete instances in which he has so acted are given. No attempt has been made to challenge this evidence ; but it must be remembered that none of it was before the Resident Magistrate at petty sessions.

During the course of the argument various reasons were suggested as to why the magistrate's order should not stand. The learned Attorney General relied upon the words of Shadwell, V.C., in *Taylor v. Barclay* (1), as to the cognisance which Courts will take of affairs of State, and he also referred us to paragraph 18 in the 12th Edition of *Taylor on Evidence* to the effect that courts will judicially recognise the political constitution of their own Government. I myself suggested the application of the principle of *Omnia praesumuntur rite et solenniter esse acta* which has been frequently applied to public and official acts as it has also been applied to private rights. The leading authorities which illustrate the maxim will be conveniently found collected in *Broom's Legal Maxims.* Amongst them is *R. v. Verelst* (2), in which Lord Ellenborough, C.J., applied the principle and held that a man, acting in a public capacity, was properly appointed and was duly authorised so to do.

In my opinion, much could be said in support of the

(1) 2 Sim. 213. (2) 3 Camp. 432.

application of both the doctrine of judicial notice and of the "*omnia praesumuntur*" principle to the present case, especially when it is borne in mind that the affairs of Northern Ireland are the concern of the Home Department as those of Eire fall to be considered by the Secretary of State for the Dominions. If either of these principles applies, it cannot be said that the magistrate was without evidence upon which he could have held affirmatively that the validity of the impugned orders was established. But I prefer to decide this case upon what seems to me to be the simple and firmer ground that in holding "No jurisdiction" the magistrate must have held that the orders were invalid on the only ground alleged, namely, that they had not been made by "the Ministers" duly authorised to do so. Such an order of "No jurisdiction" is not merely, as it is in form, an order of pure negation; it is a declaration of a most far-reaching character, and one which was admittedly made in the present case without a particle of evidence or without any presumption of law to support it. In my opinion such an order cannot be defended as meaning merely "jurisdiction not "proved." That was not what Mr. Sheil contended for; and, if the magistrate had so intended, I doubt not that he would have said so, or perhaps he would more properly have dismissed the summons "without "prejudice." The adoption of such a course, it if was what was intended by the magistrate, would have had the further advantage of removing any suggestion, however untenable, as to the matter being *res judicata*.

However this may be, I am of opinion that this Court cannot support an order such as that now impugned, which is final and conclusive in form and in character, and was made without any evidence being tendered, though admittedly on both sides it involved an issue which could only be determined by evidence.

*R. v. Brown* (1), cited by Mr. Maginess in his reply, is sufficient authority, if any be needed, that a mandamus will lie to magistrates who decline to adjudicate on the supposed ground of want of jurisdiction in matters within their province.

(1) 26 L.J.M.C. 183, 184.

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In giving judgment in the case Mr. Justice Coleridge said: "This, however, may perhaps be a test—if the "objection be such, that whatever the merits of the "case, whether the defendant be guilty or not, the "Justices hold that they cannot decide on the merits "owing to the objection, for instance, either of want of "parties or of notice, such holding is a declining of "jurisdiction and not an adjudication; and in such a "case, of which the present is one, the duty of the "Court is quite clear—to compel the Justices to "proceed."

In making absolute the conditional order for both certiorari and mandamus we consider that there should be no order as to costs in this Court.

Solicitor for the prosecutor: *Chief Crown Solicitor.*
Solicitors for the defendant: *Fisher & Fisher.*

J. McC.

## LYONS AND GOVERNOR AND COMPANY OF BANK OF IRELAND v. EAGLE STAR INSURANCE CO., LTD. (1).

K.B.D. 1938.

April 28. May 6.

*Fire Insurance—Policy—Conditions in policy forming basis of contract—Repudiation of policy—Repudiation of liability—Arbitration clause—Condition precedent to action—Application by Insurance Company to stay Action and to enforce Arbitration Clause—The Arbitration Act (Northern Ireland)*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6), *section* 4.

Policies of insurance were issued by the defendants to both plaintiffs in respect of certain premises which were afterwards destroyed by fire, containing conditions under which the policies should be avoidable in certain events, and providing that all differences arising out of the policies should be referred to the decision of an arbitrator, and that the making of an award should be a condition precedent to any right of action against the company.

The defendants relied upon (*a*) non-disclosure of a previous fire in 1909, (*b*) the refusal by another company to accept the insurance in May, 1924, and the introduction on the premises of a battery-charging apparatus, involving increase of risk without the necessary permission of the defendants.

Payment on foot of the policies was withheld by the defendants who repudiated liability on the above-mentioned grounds.

The plaintiffs then brought an action claiming for a loss under the two policies of fire insurance and for damages for breach of contract to insure the premises.

The defendants applied for an order that all further proceedings in the action be stayed and that the action be referred to arbitration on the ground that the decision of the differences between the parties by arbitration under the arbitration clause was a condition precedent to bringing the action, and relied on section 4 of the Arbitration Act (Northern Ireland), 1937.

*Held*, that the defendants were entitled to rely on the arbitration clause which made it a condition precedent to bringing an action that a decision by arbitration should first be obtained.

*Held, also*, that in resisting the plaintiff's claim the defendants were not repudiating the contract as void *ab initio* but were affirming the contract and relying on it as a subsisting contract which contained a provision under which they were entitled to escape liability.

*Stebbing v. Liverpool and London and Globe Insurance Company Ltd.* [1917] 2 K.B. 433, and *Woodall v. The Pearl Insurance Company Ltd.* [1919] 1 K.B. 593 followed.

(1) In the King's Bench Division before Andrews, L.C.J.

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MOTION by the defendants for an order that all further proceedings in the action be stayed and that the action be referred to arbitration.

The plaintiffs claimed for a loss under two policies of fire insurance upon dwelling-house, sale shop and showrooms, and for damages for breach of contract to insure the same.

The two policies were similar in form and were dated 19th April, 1929. They were for the sums of £300 and £2,000, respectively. They were issued to both plaintiffs for their respective rights and interests in premises situate in Enniskillen, which were damaged by fire on 27th August, 1937. By the policies the defendants agreed (subject to the conditions contained therein which should, so far as the nature of them respectively would permit, be deemed to be conditions precedent to the right of the insured to recover thereunder) that if the property insured be destroyed or damaged by (amongst other things) fire, etc., the company would pay to the insured the value of the property or the amount of such damage to an amount not exceeding the sums mentioned in the schedules to the policies.

The material conditions referred to in the policies were: (1) this policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular; (2) this policy shall be avoided with respect to any item thereof in regard to which there may be any alteration after the commencement of this insurance, or whereby the risk of destruction or damage is increased, unless such alteration be admitted by or on behalf of the company; (3) all differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference . . . and the making of an award shall be a condition precedent to any right of action against the company.

The defendants relied upon (*a*) non-disclosure of a previous fire in 1909, and (*b*) the refusal by another company to accept the insurance in May, 1924, as bringing the case within the operation of condition 1.

In regard to condition 2 reliance was placed by the

defendants on the fact that a certain battery-charging apparatus, involving increase of risk was introduced on the premises without the prescribed permission.

Payment on foot of the policies having been withheld the plaintiff's solicitors wrote to the defendants asking them if they would state definitely whether they repudiated the policies or not, and the defendants replied that "all liability is denied." The plaintiffs' solicitors asked for the ground upon which liability was denied, and especially they asked to be informed in specific terms as to whether or not the defendants repudiated the policies. The defendants then wrote repudiating liability on the grounds of non-disclosure and introduction of the battery and stating that they relied on conditions 1 and 2 of the policy itself.

The plaintiffs then brought an action claiming for a loss under the two policies of fire insurance upon dwelling-house, sales shop and showrooms and, for damages for breach of contract to insure the same.

The defendants applied for an order that all further proceedings in the action be stayed and that the action be referred to arbitration, on the ground that the decision of the differences between the parties by arbitration under the arbitration clause was a condition precedent to bringing the action.

In support of their application the defendants relied on section 4 of the Arbitration Act (Northern Ireland), 1937, which provides that "if any party to an arbitra-
"tion agreement, or any person claiming through or
"under him, commences any proceedings in any court
"against any other party to the agreement or any
"person claiming through or under him, in respect of
"any matter agreed to be referred, any party to such
"proceedings may at any time after appearance, and
"before delivering any pleadings or taking any other
"steps in the proceedings, apply to that Court to stay
"the proceedings, and that court if satisfied that
"there is no sufficient reason why the matter should
"not be referred in accordance with the agreement,
"and that the applicant was, at the time when the
"proceedings were commenced, and still remains,
"ready and willing to do all things necessary to the

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" proper conduct of the arbitration, may make an order " staying the proceedings."

*Black, K.C., Warnock, K.C.* (with them *McSparran*) in support of the motion by the defendants :—

Three of the conditions endorsed on the policy are important. One of these is condition 1, another is condition 2, and more particularly 2 (*b*).

We rely on section 4 of the Arbitration Act (Northern Ireland), 1937.

We do not repudiate the policy, but we repudiate liability under the policy.

There is no repudiation of the contract but we say that under the terms of the contract we are not liable. There is ample authority for this proposition.

Contracts of fire insurance are contracts *uberrimae fidei.* Whether there had been a proposal or not the matter of the previous fire should have been disclosed.

We say that the law is correctly stated in *The Law of Motor Insurance,* by Shawcross (1935 edition), page 597 where the effect of repudiation of liability under such an agreement is dealt with.

In the present case the defendauts' freedom from liability arises from the terms of the contract itself.

The present case is quite different from *Jureidini's case* (1), where it was held that the repudiation of a claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim.

The only principle to be drawn from *Jureidini's case* (1) is that if a claim is repudiated on grounds going to the root of the contract, advantage cannot be taken of the arbitration clause.

In *Woodall v. Pearl Assurance Company, Ltd.* (2), it was held that the defendants by relying on the terms of the policy which rendered it void in certain events did not thereby repudiate the policy as a binding contract between the parties, and were entitled to rely upon the arbitration clause as a defence to the action.

The present case comes within the words used by Lord Sumner in his speech in *Macaura v. Northern*

(1) [1915] A.C. 499. (2) [1919] 1 K. 593.

*Assurance Co.* (1), when he said : " The defendants do " not repudiate the policy or dispute its validity as a " contract ; on the contrary they rely on it and say " that according to its terms, express and implied, " they are relieved from liability ; see *Stebbing's case* (2); " *Woodall v. Pearl Assurance Co.* (3)."

[They also referred to *Golding v. London and Edinburgh Insurance Company* (4), *Freshwater v. Western Australian Insurance Company* (5), *Stevens v. Timber and General Mutual Accident Insurance Association, Ltd.* (6), *Kennedy v. London Express Newspapers* (7), and *Gaw v. British Law Fire Insurance Co.* (8).]

*The Attorney General* (*E. S. Murphy, K.C.*) and *Patton* for the plaintiffs :—

The Court should favour a course that would enable the question to be litigated before the highest tribunal. This is ultimately a matter for the exercise of the Court's judicial discretion.

We submit that the Court should allow the action to proceed. The plaintiffs have a claim for damages outside the policy. The authorities which have been cited do not bind the Court where there is a claim under the policy and also a claim outside the policy. The question of alleged non-disclosure should be ventilated in a public court.

The two grounds relied on by the defendants go to avoid the policy *ab initio.*

We submit that the law is correctly stated in *McGillivray on Insurance Law* (2nd edition), page 1102 : " If the repudiation amounts to a contention that the " whole contract is void, on the ground, for instance, " of arson by the assured, then the company cannot " take advantage of a clause in that contract and " insist on arbitration on the general principle which " forbids ' approbation and reprobation.' "

The facts in the present case are similar to those in

(1) [1925] A.C. 619, 631.
(2) [1917] 2 K.B. 433.
(3) [1919] 1 K.B. 593.
(4) 43 Ll. L. Rep. 487.
(5) [1933] 1 K.B. 515.
(6) 102 L.J. [K.B.] 337.
(7) [1931] I.R. 532.
(8) [1908] 1 I.R. 245.

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*Jureidini v. National British and Irish Millers Insurance Company Limited* (1).

In the speech of Lord Dunedin in *Jureidini v. National British and Irish Millers, Ltd.* (1), at page 507 there is no distinction made between repudiating the policy and repudiating the liability under the policy.

The speech of Lord Atkinson in *Jureidini v. National British and Irish Millers, Ltd.* (1), is very material to the present case. It is perfectly clear that Lord Atkinson when delivering that speech put the case on the broad ground of repudiation. His speech was a perfectly general pronouncement in favour of the view that an insurance company cannot repudiate liability and hold the insured bound by the arbitration clause in the policy.

*Woodall v. Pearl Insurance Company* (2) is distinguishable from the present case, because there, there were answers to a proposal form which were made the basis of the contract.

*Golding v. London and Edinburgh Insurance Company* (3), and *Freshwater v. Western Australian Assurance Company* (4), are also distinguishable.

*Jones v. Birch Bros., Ltd.* (5), cannot be treated as an authority affecting the decision in *Jureidini v. National British and Irish Millers, Ltd.* (1).

Some of the cases relied on by the defendants are distinguishable, as in these cases no proposal form duly filled up by the plaintiffs and made the basis of the contract had been obtained by the defendants before insurance. *Golding v. London and Edinburgh Insurance Company* (3) is distinguishable on this ground.

There is no distinction in principle between the decision in *Jureidini v. National British and Irish Millers, Ltd.* (1) and the present case.

Sufficient reason has been shown why the matter should not be referred to arbitration under section 4 of the Arbitration Act (Northern Ireland), 1937, and the Court should exercise its discretion and refuse to refer the matter to arbitration.

(1) [1915] A.C. 499, 507, 508.
(2) [1919] 1 K.B. 593.
(3) 43 Ll. L. Rep. 487.
(4) [1933] 1 K.B. 515.
(5) [1933] 2 K.B. 597.

While there is no express charge of fraud, there is a charge of non-disclosure which the plaintiff is entitled to object to most strongly.

These are all reasons why this matter should not be stayed and referred to arbitration.

[They also referred to *Stebbing v. Liverpool and London and Globe Insurance Company, Ltd.* (1), and *Stevens v. Timber and General Mutual Accident Insurance Association, Ltd.* (2).]

*Black, K.C.* (in reply):—

It would be a very easy mode of avoiding going to arbitration to tack on a claim for breach of contract to insure the premises.

We rely on the terms of the policies. The only breach of contract alleged is a failure to pay under the terms of the policies.

A proposal form should not make any difference. The words are "all differences arising out of the policy "shall be referred to arbitration." Any dispute arising under conditions 1 and 2 is a difference arising out of the policy.

The point in regard to the proposal form was not raised in any of the judgments in the cases that have been cited. In none of these judgments is it suggested that the decision turned on the proposal form.

[He also referred to *Golding v. London and Edinburgh Insurance Company, Ltd.* (3), *Stevens v. Timber and General Mutual Accident Insurance Association, Ltd.* (2), and *Woodall v. The Pearl Insurance Company, Ltd.* (4).

May 6.

ANDREWS, L.C.J.

ANDREWS, L.C.J.: This is a motion by the defendants for an order that all further proceedings in this action be stayed and that the action be referred to arbitration The plaintiffs' writ of summons is indorsed with a claim for a loss under two policies of fire insurance upon dwelling house, saleshop and showrooms, and for damages for breach of contract to insure the same.

The policies which were in similar form, and both of which are dated 19th April, 1929, are for the sums of

(1) [1917] 2 K.B. 433.
(2) 102 L.J. [K.B.] 337.
(3) 43 Ll. L. Rep. 487.
(4) [1919] 1 K.B. 593.

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£300 and £2,000, respectively. They were issued to both plaintiffs for their respective rights and interests in certain premises situate in Enniskillen which were damaged by fire on 27th August, 1937. By the said policies the defendants agreed (subject to the conditions contained therein . . . which should, so far as the nature of them respectively would permit, be deemed to be conditions precedent to the right of the insured to recover thereunder) that if the property insured be destroyed or damaged by (amongst other things) fire . . . the company would pay to the insured the value of the property or the amount of such damage to an amount not exceeding the sums mentioned in the schedules to the policies.

Of the twelve conditions referred to in the policies three only were mentioned in argument as material to the present case. They are as follows :—

1. This policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular.

2. This policy shall be avoided with respect to any item thereof in regard to which there may be any alteration after the commencement of this insurance (*a*) . . . or (*b*) whereby the risk of destruction or damage is increased, or (*c*) . . . unless such alteration be admitted by memorandum signed by or on behalf of the company.

3. All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference . . . and the making of an award shall be a condition precedent to any right of action against the company.

Two circumstances are relied upon by the defendants as bringing the case within the operation of condition 1, namely, non-disclosure of (*a*) a previous fire in 1909, and (*b*) of the refusal by another company to accept the insurance in May, 1924. In regard to condition 2 reliance is placed by the defendants on the fact that a certain battery charging apparatus, involving increase of risk, was introduced on the premises without the prescribed permission.

In support of their application the defendants rely

upon section 4 of the Arbitration Act (Northern Ireland), 1937, which is as follows :—

"If any party to an arbitration agreement, or "any person claiming through or under him, "commences any proceedings in any court against "any other party to the agreement, or any person "claiming through or under him, in respect of any "matter agreed to be referred, any party to such "proceedings may at any time after appearance, and "before delivering any pleadings, or taking any "other steps in the proceedings, apply to that court "to stay the proceedings and that court, if satisfied "that there is no sufficient reason why the matter "should not be referred in accordance with the "agreement, and that the applicant was, at the time "when the proceedings were commenced, and still "remains, ready and willing to do all things necessary "to the proper conduct of the arbitration, may make "an order staying the proceedings."

During the course of the arguments many cases were cited. The Attorney General on behalf of the plaintiffs founded his argument mainly upon the decision of the House of Lords in *Jureidini v. National British and Irish Millers Insurance Co., Ltd.* (1), whilst the defendants' counsel, Mr. Black, placed reliance mainly upon *Stebbing v. Liverpool and London Globe Insurance Co., Ltd.* (2), *Woodall v. Pearl Assurance Co.* (3), and many subsequent cases in which *Jureidini's case* (1) was considered and distinguished.

Many of the judgments in the more recent authorities consist mainly of a review of the earlier cases. I feel that it would serve no useful purpose to travel over the same well-trodden path ; but perhaps it might be found serviceable if I endeavour to state in summary form some of the propositions of law relevant to cases of this character which appear to me to emerge fully supported with the weight and authority of high judicial opinion.

1. Parties cannot by contract oust the Courts of their jurisdiction, for this would involve a forfeiture of an inalienable right and would be against the

(1) [1915] A.C. 499.
(2) [1917] 2 K.B. 433.
(3) [1919] 1 K.B. 593.

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liberty of the law which secures to everyone the right of submitting to the Courts any matters in respect of which he claims redress. But it is lawful for them to agree that no right of action shall accrue until a preliminary condition has been complied with, such as that a third person shall have decided on any difference that may arise between them. The obtaining of such decision may be lawfully made a condition precedent to the right to maintain suit. *Scott v. Avery* (1).

2. Where the conditions of contract provide (*a*) that if the claim be fraudulent or if the loss be occasioned by the wilful act or with the connivance of the insured all benefit under the policy should be forfeited, and (*b*) that if any difference arise as to the amount of any loss such difference shall be referred to arbitration, and the award of the arbitrator shall be made a condition precedent to right of action, then and in such event the repudiation of the claim on a ground going to the root of the contract precludes the pleading of the arbitration clause as a bar to an action to enforce the claim. This is the decision in *Jureidini's case* (2), but for a proper appreciation of the ground and true limits of that decision two points must be carefully noted. In the first place, in *Jureidini's case* (2) there was a total repudiation of the contract in the sense that they were disputing the existence of any binding contract at all. It is not sound law to permit a person to repudiate a contract in this sense, and thereupon specifically to found upon a term in that contract which he has thus repudiated. The forfeiture of all benefit under the contract must include the benefit of the right to go to arbitration. In the second place, it is to be observed that the arbitration clause in *Jureidini's case* (2) only applied to cases in which a difference arose as to the *amount* of any loss. It could not in such case be relied upon by a party who repudiated the entire contract on the ground of fraud, and who, accordingly, did not merely dispute the amount of the claim, but contended that no loss

(1) 5 H.L.C. 811. (2) [1915] A.C. 499.

whatever was recoverable by the claimant. That this was at least an important ground of the decision is apparent from the judgment of Bankes, L.J., in *Woodall v. Pearl Assurance Co.* (1), at p. 605, with which I express my respectful concurrence. The dispute did not come within the terms of the arbitration clause at all as the insurance company took up the position that they repudiated the contract in the fullest sense. In truth, as was pointed out in *Jureidini's case* (2), and by Warrington, L.J., in *Woodall's case* (1), if the contention of the insurance company had prevailed in *Jureidini's case* (2) there would have been no means of deciding the question of the liability of the company; for according to their contention it could not have been decided by the Court; and by the terms of the arbitration clause it could not have been decided by arbitration. I may add that this view of *Jureidini's case* (2) is fully supported by the speech of Lord Sumner in *Macaura v. Northern Assurance Co.* (3), at p. 631.

3. The terms "repudiating the contract" and "avoiding the contract" are sometimes rather loosely and ambiguously used, and are applied to two entirely different classes of case. In what is probably the true, and certainly the fullest, sense they mean that the entire contract is gone by reason of something outside and which forms no part of the contract, such as a misrepresentation of some material fact inducing the contract, of which the force and effect are not declared by the contract itself. If a contract is "repudiated" or "avoided" in this sense, reliance cannot be placed upon an arbitration clause which is part of the contract, for the benefit of this clause has disappeared with the contract. Disaffirming the one involves disaffirming the other. On the other hand, the terms are frequently used, as the word "avoided" is used in condition 2 of the policy in the present case, as meaning that by reason of a condition in the contract

(1) [1919] 1 K. 593, 605, 609.
(2) [1915] A.C. 499.
(3) [1925] A.C. 619, 631.

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itself all liability under the contract is avoided. In such a case in resisting a claim the party is not repudiating the contract as void *ab initio*, but is affirming the contract and is relying on it as a subsisting contract which contains a provision under which he is entitled to escape liability. It is a term of the contract itself which in such a case absolves from liability. *Stebbing v. Liverpool and London Globe Insurance Co., Ltd.* (1), and *Woodall v. The Pearl Insurance Co., Ltd.* (2).

In my opinion the views which I have expressed are fully supported by the cases to which I have referred, as also by such later authorities as *Golding v. London and Edinburgh Insurance Co.* (3), *Freshwater v. Western Australian Assurance Co.* (4), *Jones v. Birch Bros., Ltd.* (5), *Stevens v. Timber and General Mutual Accident Insurance Association, Ltd.* (6), and *Toller v. Law Accident Insurance Co.* (7). I may add that the principles enunciated in all these cases were fully recognised by the Irish Courts in *Richardson v. Army, Navy and General Assurance Association, Ltd.* (8), and *Kennedy v. London Express Newspapers* (9), but the Courts decided against the defendants in those cases on other grounds immaterial for our present purposes. The judgment of Molony, C.J., in *Richardson v. Army, Navy and General Assurance Association, Ltd.* (8) is most valuable as showing the distinction to be drawn between cases of that character, in which the differences to be referred under the arbitration clause included "all differences arising out of the "policy," and an earlier case against the same defendants—*Ballasty v. Army, Navy and General Assurance Association, Ltd.* (10)—in which such words did not appear. These all-important words are to be found in the arbitration clause in the present case.

It only remains for me to apply these principles to the facts of the present case. When payment on foot

(1) [1917] 2 K.B. 433.
(2) [1919] 1 K.B. 593.
(3) 43 Ll. L. Rep. 487.
(4) [1933] 1 K.B. 515.
(5) [1933] 2 K.B. 597.
(6) 102 L.J.K.B. 337.
(7) [1936] 2 All. E. R. 952.
(8) [1924] 2 I.R. 96.
(9) [1931] I.R. 532.
(10) 50 I.L.T.R. 114.

of the policies was withheld the plaintiffs' solicitors wrote to the defendants on 23rd December, 1937, asking them if they would state definitely whether they repudiated the policies or not, to which question the defendants replied on 5th January, 1938, that "all liability is denied." On the following day the plaintiffs' solicitors asked for the grounds upon which liability was denied, and, in particular, they sought information in specific terms in regard to the question which they put in their letter of 23rd December, namely, whether or not they repudiated the policies. In their reply of 11th January the defendants repudiated liability on the grounds of non-disclosure and introduction of the battery above referred to ; and the letter ended with the important words : "We rely on "conditions 1 and 2 of the policy itself."

It is clear to demonstration that this correspondence was conducted on both sides with a full appreciation on the part of the writers of the letters of the underlying principles of *Jureidini's case* (1), and the subsequent cases to which I have referred. The plaintiffs' solicitors with perfectly legitimate legal propriety were as anxious to lead the defendants into a pitfall as they were determined to avoid it. The defendants won the game. Never did they repudiate the policies in the sense of denying their existence as binding contracts. On the contrary, they accepted their existence and merely repudiated liability under a term of the contracts which they so affirmed.

The Attorney General sought to distinguish the present case from some of the cases relied upon by the defendants on the ground that no proposal form duly filled up by the plaintiffs, and made the basis of the contract, had been obtained by the defendants before insurance. In my opinion the decisions in the cases referred to did not turn upon the existence of formal proposals prior to insurance, and such cases cannot properly be distinguished on such a ground.

Another point made by the Attorney General was that the writ of summons contains a claim for breach of contract to insure the premises. There is not a

(1) [1915] A.C. 499.

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scintilla of evidence to support this claim, and it is, indeed, negatived by the uncontradicted facts of the case. If this claim was inserted in the writ for any purpose other than an attempt to oust the jurisdiction of the Court, it must have been on the assumption that the first two grounds relied upon in the defendants' letter of 11th January, 1938, made the policies void *ab initio*. As there is no justification in my opinion for this view, I must ignore the claim, and I am prepared, if so requested, to make an order that this portion of the claim be struck out.

Finally, the Attorney General appealed to my discretion under section 4 of the Act of 1937, and especially relied upon the fact that an order staying proceedings can only be tested as far as the Court of Appeal, whereas if the action were allowed to continue and the defendants were left to plead in bar, a decision by the House of Lords could be obtained. This is an argument which, if it were to prevail, would be an answer to an application to stay in every case of any importance. In my opinion, when the conditions referred to in section 4 are complied with, as in my opinion they are in the present case, there is at least a strong *prima facie* case for the Court making an order which will enforce the terms of the contract into which the parties voluntarily entered with, it must be assumed, a proper appreciation of its consequences.

In my opinion, therefore, the action should be stayed, and the motion granted with costs.

Solicitors for the plaintiffs : *J. C. Taylor & Co.*
Solicitors for the defendants : *J. C. W. Rea & Son.*

J. McC.

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County of T., or other district, parish, townland or sub-denomination. This notice was received by the Secretary of the County Council of T. and by the Clerk of the C. Rural District Council. The Recorder of L. made a decree in favour of the applicant and ordered that the T. County Council be added as respondents. He declared the applicant entitled to £160 compensation and £11 12*s.* 7*d.* for costs, of which £128 14*s.* 5*d.* should be paid by the county of L. and £42 18*s.* 2*d.* by the county of T., the sum of £128 14*s.* 5*d.* to be raised by the County Council of L. off the electoral division of L. Upper and the sum of £42 18*s.* 2*d.* to be raised by the County Council of T. in accordance with the provisions of 6 & 7 Wm. 4, c. 116, section 140. No question was ever raised on behalf of the County Council of T. as to their not having sufficient particulars of the malicious injury or as to their having too short notice. Subsequently the applicant obtained an order from the King's Bench Division giving him liberty to issue a writ of certiorari to remove the decree into the High Court. The applicant also obtained a writ of fieri facias on foot of the order of certiorari. The County Council of T. then applied for an order directing that the order giving liberty to the applicant to issue a writ of certiorari to remove the decree into the High Court and all subsequent proceedings consequent on that order be set aside. *Held*, by Andrews, L.C.J., that the Recorder of L. had ample jurisdiction to make the apportionment of compensation contained in his decree. *Held also* that there was no substance in the point that the procedure adopted was not expressly provided for by the rules, but in any case such an irregularity could not affect a jurisdiction which undoubtedly exists and accordingly should not be allowed to affect the validity of a decree from which an appeal might have been but was not taken. *Held further* that a criminal injury decree which has been removed to the High Court on certiorari is enforceable by writ of *fieri facias*.
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a decision by arbitration should first be obtained. *Held, also,* that in resisting the plaintiff's claim the defendants were not repudiating the contract as void *ab initio,* but were affirming the contract and relying on it as a subsisting contract which contained a provision under which they were entitled to escape liability. *Stebbing v. Liverpool and London and Globe Insurance Company, Ltd.* [1917] 2 K.B. 433, and *Woodall v. The Pearl Insurance Company, Ltd.* [1919] 1 K.B. 593 followed. *Lyons and Governor and Company of The Bank of Ireland v. Eagle Star Insurance Co., Ltd.*
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LICENSING LAW—Intoxicating Liquor and Licensing Act (Northern Ireland), 1927 (17 & 18 Geo. 5, c. 21), section 3 (4)—Tenancy in licensed premises determined—Licence "extinguished" or surrendered"—Premises in vicinity of the premises to which extinguished licence had been attached—*Licensing (Ireland) Act,* 1902 (2 *Edw.* 7, *c,* 18), *section* 3—*Town Tenants (Ireland) Act,* 1906 (6 *Edw.* 7, *c.* 54), *section* 5. A limited company was quarterly tenant to the L. Corporation of certain licensed premises. In respect of these premises the company held an ordinary licence to sell beer, cider and spirits by retail. The tenancy was determined by notice to quit and expired on 15th May, 1937. By reason of the expiration of the tenancy the licence held in connection with the premises was extinguished. The applicant applied for an ordinary licence to sell beer, cider, and spirits by retail in premises in the vicinity of the premises to which the licence so extinguished was attached. The limited company had abandoned any claim which they might have had under section 5 of the Town Tenants (Ireland) Act, 1906, to compensation for loss of goodwill in respect of the tenancy of the premises to which the licence so extinguished was attached. The applicant had never had any interest in the tenancy of the premises which had been determined and had no possible claim

under the Town Tenants (Ireland) Act, 1906, for loss of goodwill in respect of those premises. Objection was taken to the granting of the licence on the grounds (*inter alia*) that on the true construction of section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, a licence in respect of premises in the vicinity of the premises to which the extinguished licence had been attached could be granted only to the person who had been tenant of such premises and had held the extinguished licence. The Recorder of L. held that as a matter of law under section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland) 1927, a licence could be granted only to the person who had been tenant or licensee of the premises to which the extinguished licence had been attached and that he was bound in law to refuse the application for the licence. A conditional order for a writ of certiorari was granted by the Lord Chief Justice on the ground that the order of the Recorder was erroneous in point of law. Cause having been shown the matter came before the King's Bench Division consisting of Andrews, L.C.J., and Brown, J., who held that it was not necessary that the applicant for a licence under section 3 (4) of the Intoxicating Liquor and Licensing Act (Northern Ireland), 1927, should have been tenant of the premises to which the extinguished licence had been attached or that he should have held the extinguished licence. The cause shown was therefore disallowed. *R.* (*Mulhern*) *v. The Recorder of Londonderry* K.B.D. 68

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LUNACY—Deceased Lunatic—Freehold Property of Deceased—Order of Court directing Sale by Committee—Necessity for concurrence of Heir-at-Law in Conveyance—*Lunacy Regulation* (*Ireland*) *Act*, 1871 (34 & 35 *Vict.*, c. 22), *sections* 51 *and* 63. A., a lunatic, was, at the time of his death, beneficially entitled to certain freehold property, which, by order of the Court was directed to be sold by the Committee by public auction upon and subject to such terms and conditions of sale as should be settled by the acting registrar in lunacy. The object of the sale was to enable claims and demands against the estate of the lunatic to be discharged. Conditions of sale were duly settled in which, by condition 10 (*b*), the purchaser was bound to assume (*inter alia*) that the deceased in the events which had happened became entitled to the property under the terms of the will of one Thomas Lundy. Condition 12 referred to the order for sale and to the fact that the committee, being a person appointed by the Court, the only covenants for title to be given by him should be such as were implied by his conveying under order of the Court. By condition 17 the purchaser was bound to accept all statements and findings in any order of the Court and registrar's rulings as conclusive. There was no finding by either the Court or registrar as to the heir-at-law of the deceased. The premises were duly sold by public auction and the sale confirmed by the registrar in lunacy, the entire purchase money being lodged in Court to the credit of the matter. By No. 5 of his requisitions the purchaser asked who was the heir-at-law of the deceased, and that such heir-at-law should join in the deed. To this the vendor replied by referring to conditions 10 (*b*), 12 and 17, mentioned above. Section 51 of the Lunacy Regulation (Ireland) Act, 1871, provides that notwithstanding the death of a lunatic, the real and personal estate of such deceased lunatic shall continue under and in the control, custody and protection of the Lord Chancellor . . . until the Lord Chancellor . . . shall have by an order discharged the real and personal estate of the deceased lunatic from the custody and protection of the Court; and until such order . . . the Lord Chancellor . . . shall retain, possess, enjoy and exercise the same powers, control and authority over the real and personal estate of the deceased lunatic as he would and might have possessed, enjoyed and exercised over such real and personal estate if the said deceased lunatic had not died as aforesaid. Section 63 empowers the Lord Chancellor to order a sale of the lunatic's land for the purpose of raising money to be applied as therein mentioned; and the section concludes:—"And the committee of the estate may and shall in the name and on behalf of the lunatic execute, make and do all such conveyances, deeds, transfers, and things relative to any such sale . . . as the Lord Chancellor . . . shall order." It was argued on behalf of the vendor that these two sections when read together conferred upon the committee power to execute a conveyance of land, sold under order of the Court, which belonged to the lunatic, even though such lunatic was deceased at the time that the order for sale was made. *Held*, that section 51 does not widen, extend, or amend the power to execute the conveyance conferred upon the committee by section 63 and, consequently, that requisition No. 5 had not been sufficiently answered. *In the Matter of A., a person of unsound mind.*
L.C.J. IN LUNACY 42

MEMBERS OF GOLF CLUB—Duties and Liabilities 114
*See* Negligence (2).

MOTOR CYCLE—Policy of Insurance not in force—Disqualification for holding Licence—Motor Salesman—Licence required for purpose of Business—Whether "Special Reason"—*Motor Vehicles and Road Traffic Act* (*Northern Ireland*), 1930 (20 & 21 *Geo.* 5, c. 24), *section* 6 (2). The defendant, who was a motor agent or salesman, was convicted at Petty Sessions of using a motor cycle on the public highway there not being in force in relation to

the user thereof a policy of insurance or security against third party risks in compliance with the Road Traffic Act (Northern Ireland), 1930. Section 6 (2) of that Act provides that a person convicted of an offence under the section shall (unless the Court for special reasons thinks fit to order otherwise and without prejudice to the power of the Court to order a longer period of disqualification) be disqualified for holding or obtaining a licence under section 3 of the principal Act for a period of twelve months from the date of conviction. The magistrate decided not to disqualify the defendant for holding a licence on the ground that the fact that the defendant required the licence for the purpose of carrying on his business constituted a special reason within the meaning of the said section 6 (2). *Held*, that a special reason within the exception prescribed by section 6 (2) is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence; and that a circumstance peculiar to the offender as distinguished from the offence is not a special reason. *R. (Magill) v. Crossan.* [K.B.D. 106

MOTOR VEHICLES—SPEED OFFENCES—PREVIOUS CONVICTIONS—*Convicted on six previous occasions—A period of less than twelve months between sixth and seventh convictions and of more than twelve months between the fifth and sixth convictions—Motor Vehicles (Traffic and Regulation) Act (Northern Ireland)*, 1926 (16 & 17 *Geo.* 5, *c.* 31), *sections* 6 (2), 4 (1) (*i*)—*Whether last conviction should be treated as a second conviction or whether all previous convictions should be taken into account—Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1929 (20 *Geo.* 5, c. 21), *section* 1 (1)—*Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, *c.* 15), *section* 3 (1). The defendant was charged at petty sessions with having driven a motor goods vehicle on the public highway at a speed of 32 miles per hour, the maximum speed laid down for such vehicle being twenty miles per hour; contrary to Motor Vehicles and Road Traffic Acts (Northern Ireland), 1926 to 1934, and regulations made thereunder. The resident magistrate convicted the defendant, and ordered that he be fined the sum of £5 and the sum of six shillings for costs and in default of payment be imprisoned for two months without hard labour unless such sums be sooner paid. His driving licence was suspended for six months and his conviction was to be recorded on the licence. The defendant appealed to quarter sessions. At the hearing at quarter sessions the defendant admitted the offence charged and also admitted the following previous convictions for similar offences at C. petty sessions on 1st November, 1937; at same petty sessions on 5th October, 1936, at D. petty sessions on 14th September, 1936, at P. petty sessions on 9th March, 1936, at M. petty sessions on 27th November, 1935, and at L. petty sessions on 10th November, 1932. The County Court Judge of A. decided that the conviction in the present case was a second conviction within the meaning of section 6 (2) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, and that the provisions of paragraph (i) of the proviso to sub-section (1) of section 4 of that Act did not apply. He, therefore, varied the decision of the resident magistrate and imposed the minimum penalty of £2 and removed the suspension from the defendant's licence, but stated a case for the opinion of the King's Bench Division as to whether he was right in so deciding. *Held*, by the King's Bench Division (Andrews, L.C.J., and Brown, J.), that as a period of twelve months had not elapsed since defendant's last previous conviction for a speed offence, all previous convictions should be taken into account for the purpose of determining the penalty for the offence in respect of which the appeal was brought, and that consequently the defendant was not entitled to the benefit of the provisions set out in section 1 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1929, and that the resident magistrate was right in deciding as he did. The question put to the Court was consequently answered in the negative. *R. (Kenny) v. Hughes* . [K.B.D. 59

NEGLIGENCE (1)—APPLICATION FOR LIBERTY TO INCREASE LODGMENT—FIRST LODGMENT MADE WITH DENIAL OF LIABILITY—*Defence not delivered at date of application—Right of defendant*

*to make second lodgment—Whether leave of Court necessary—R.S.C.* (*N.I.*), 1936, *Order* 22, *r.* 1 (1)—*R.S.C.* (*England*), 1883, *Order* 22, *r.* 1 (1), *r.* 2 (1). The defendant in an action for negligence applied under Order 22, r. (1), to the court for an order giving him liberty to increase the lodgment of £15 made by him by the sum of £60. The lodgment of £15 was made with a denial of liability, on the same day upon which an appearance was entered. The plaintiff's solicitor refused to consent to an application being made to the court for liberty to increase the lodgment. *Held*, by Andrews, L.C.J., that as issue had not been joined the defendant was entitled without leave of the court to make an increased lodgment provided he served a notice of such further lodgment upon the plaintiff. *Gallagher v. Young.*
[K.B.D. 146

NEGLIGENCE (2)—Golf—Risks of the Game—Rules of the Game—Notices—Terms implied in contract between Club and Player on payment of Green Fee—Liability of Golf Club to ordinary members and to visiting members—Duties and liabilities of ordinary members and visiting members inter se—Nature and construction of Course as affecting liability—Functions of the Judge and Jury—Effect of Jury's Rider. A golf player in the course of a game whilst putting on a green was struck by a ball driven by a player from an adjoining tee and lost the sight of an eye. *Held*, by the Court of Appeal (Babington, L.J., and Brown, J., Best, L.J., having died during the period between the hearing and the delivery of judgment, but having during his lifetime agreed to the conclusions expressed in the judgment), that the Lord Chief Justice should have acceded to the request of counsel for the Club and withdrawn the case against the Club from the jury on the grounds that when the plaintiff paid his green fee and received his ticket, he impliedly agreed to take the course as he found it, provided it was free from unusual dangers or traps, and to accept the risks of the game as between himself and the Club, and that the injury he received was due to a risk of the game and not to any negligent design or construction of the course. *Held, also*, that the plaintiff could not on appeal rely on new matter imported into the case for the first time by the jury by way of rider to their findings. Every player when on the course must take due care for his own safety and for the safety of others by keeping a good look out for the disposition of the various greens and tees as he is coming to them or going from them, more especially if he is a stranger to the course, and must keep a good look out for the whereabouts of other players, whether in front or behind, in whose line he may find himself, thereby running the risk of being hit, or who may appear in his line so that he runs the risk of hitting them ; also, he must act on the knowledge so acquired and not place himself in a position where he is in danger of being hit by other players if he can avoid it, nor himself play a shot while other players are in a place where he may hit them without giving them due warning and being satisfied that they have received it. *Potter v. Carlisle and The Cliftonville Golf Club.* [C.A. 114

OFFENCE—Previous Convictions—Second Conviction .. 59
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*See* Practice (1).

OWNER—Premises—Betting 98
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PARTNERSHIP—Bankruptcy—Stranger—Jurisdiction to make Order .. .. 1
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PETTY SESSIONS DISTRICT—Townlands in two Counties—Appeal .. .. .. 49
*See* Summary Jurisdiction (1).

POPULATION—Twenty-five per cent. increase—Whether City, Ward or Electoral Division .. .. .. 9
*See* Licensing Law (2).

PRACTICE (1)—Administration—Originating Summons—Jurisdiction—Person claiming adversely to Estate—*R. S. C.* (*Ir.*) 1905, *Order*

55, *rules* 4 (*a*), 4 (*g*) *and* 5—*R. S. C.* (*N.I.*) 1936, *Order* 55, *rule* 12. The plaintiff, who was the administrator with the will annexed of the deceased, claimed a sum of £3,772, which had been on deposit receipt in the joint names of the testatrix and the defendant and had been paid out to the defendant shortly before the death of the testatrix. The plaintiff brought proceedings by originating summons for a declaration that the said sum of £3,772 formed part of the estate of deceased, or, in the alternative, for an order for the administration of the estate; and the Judge on making an order for administration directed, in addition, that it was expedient for the purpose of the proceedings to determine whether the deceased had or was entitled at the date of her death to any interest and, if so, what interest in the said sum of £3,772. Apart from this sum the estate was nominal and the administration free from difficulty. *Held*, that Order 55, rule 12, read in conjunction with Order 55, rule 5, does not confer jurisdiction upon the Court to determine in such proceedings a claim of this character made by a person claiming adversely to the estate. *Fowkes v. Pascoe* 43 Ch. D. 401 considered. *In re McQuillan, deceased. Meegan v. Harvey.* [C.A. 164

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*See* NEGLIGENCE (1).

PRACTICE—BANKRUPTCY—PARTNERSHIP—POWER TO MAKE ORDER .. .. .. 1
*See* BANKRUPTCY.

PRACTICE (2)—ORDER IN CHAMBERS—APPEAL TO COURT OF APPEAL—*Special Leave—Judicature Act (Ireland)* 1877 (40 *& 41 Vict., c.* 57), *section* 54—*Administration—Charge by Executrix on Specific Asset—Charge subsequent to Testator's Death—Right to Administration—Subrogation.* Only in very exceptional circumstances will an appeal from an order made in Chambers be heard by the Court of Appeal unless it is made up as a Court order. A testator bequeathed his house, farm and all his other property to his wife, the defendant, directing her to use it for her own support and the benefit of the children and provided for the allocation of the property by her amongst her children at her decease. The defendant executed a charge for £150 in favour of the plaintiff expressly as executrix and personal representative, in respect of money declared to be required by her for the purposes of the administration of the estate. The plaintiff brought an originating summons before the Judge sitting in Chambers to raise the amount of the charge. The defendant appeared in person, and the Judge having heard Counsel for the plaintiff, the defendant not objecting, amended the originating summons and made an order directing the administration of the real and personal estate of the deceased. The defendant appealed to the Court of Appeal. *Held*, that a right of indemnity out of the general estate of the testator existed in favour of the defendant, and that the plaintiff was entitled to be subrogated to her rights and so to claim directly against the estate, and accordingly, that the order appealed from was properly made. *Farhall v. Farhall*, 7 *Ch.* 123, *distinguished. In re Geary. Sandford v. Geary.* [C.A. 152

PREMISES USED FOR PURPOSES OF BETTING WITH PERSONS RESORTING THERETO—"OWNER"—*Betting Act*, 1853 (16 *& 17 Vict., c.* 119), *section* 3. A summons against the defendant for permitting premises at 72 Carlisle Street, Belfast, of which he was alleged to be the owner, to be used by other persons for the purposes of betting with persons resorting thereto was dismissed by the resident magistrate on the ground that the defendant was not the "owner" of the premises. The defendant, in a statement to the police, had said that he was the owner of the said premises but had let them to M'P. as a dwelling-house with no restriction as a monthly tenant and that he was aware that M'P. was using the premises for a purpose other than living in. At the hearing before the resident magistrate an assignment of the said premises to M. for a term of 1,000 years subject to a rent of £5 per annum was produced, and it was argued that M. was the "owner" of the premises within the meaning of section 3 of the Betting Act, 1853. *Held*, that any person who is entitled in fee simple in possession

or who is beneficially in receipt of rent from the occupier may be an " owner " of premises within the said section. *R. (Williams) v. McAlevey.* [K.B.D. 98

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——10 & 11 Geo. 5, c. 66, ss. 3, 9 76
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——20 Geo. 5, c. 21, s. 1 .. .. 59
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——24 & 25 Geo. 5, c. 15, s. 3 .. 59
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——25 & 26 Geo. 5, c. 13, s. 24 (3) 49
*See* SUMMARY JURISDICTION (1).

——1 Ed. 8 & 1 Geo. 6, c. 50, ss. 7, 58 .. .. .. .. .. 178
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——R.S.C. (N.I.), Or. 28, rr. 1, 12 152
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SUMMARY JURISDICTION (1)—JURISDICTION—OFFENCE COMMITTED IN TOWNLAND OF C., IN COUNTY OF A. —*In year* 1864 *certain townlands, including townland of C., belonging to County of A., annexed to Petty Sessions District of N., County of D.—Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict., c.* 93), *sections* 1, 24—*Appeal made to Quarter Sessions for Division of N., and County of D.—Whether County Court Judge of D. entitled to hear appeals from N. Petty Sessions in respect of offences arising in that portion of N. Petty Sessions District situate in County of A.—Summary Jurisdiction and Criminal Justice Act (Northern Ireland)*, 1935 (25 & 26 *Geo.* 5, *c.* 13), *section* 24 (3). At N. Petty Sessions the defendant was convicted of the dangerous driving of a motor car at C., in the County of A. He was fined 40*s.* 0*d.* and costs and his driver's licence was suspended for six months. He served a notice of appeal against the conviction and order, to the Quarter Sessions to be held at N. for the division of N. and County of D. In 1864 the townland of C., in the county of A., where the alleged offence was committed was annexed to the Petty Sessions District of N., under the provisions of section 1 of the Petty Sessions (Ireland) Act, 1851. Since that time appeals from convictions in cases arising in the townland of C. had always been heard at the Quarter Sessions held at N. for the division of N. and County of D. Section 1 of the Petty Sessions (Ireland) Act, 1851, provided (*inter alia*) that whenever it should appear to the justices at Quarter Sessions that any of the petty sessions districts in any county required alteration they should proceed at the next quarter sessions which should be held for such county to revise the said districts subject to certain provisions. One of these provisions was that they should divide such county into convenient petty sessions districts for the purposes of the Act, and should declare the several parishes or townlands of which each of such districts should consist; and in doing so it should be lawful for them with the concurrence of the justices of any adjoining county assembled at any like quarter sessions, or at any adjournment of the same, to include in any of such districts any townlands of such adjoining county, where it should be conducive to the public convenience, and where no part of such townlands should be at a greater distance than seven miles from the place where petty sessions should be held for the district to which same should be annexed.

Section 24 of the Petty Sessions (Ireland) Act, 1851, provides (*inter alia*) that in any case of summary jurisdiction, where such order shall be made by the justices as is therein mentioned, either party in cases of a civil nature, or the party against whom the order shall have been made in other cases, shall be entitled to appeal to the next quarter sessions to be held in the same division of the county. Section 24 (3) (*a*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, provides that "The appeal shall be made to the "next court of quarter sessions having "jurisdiction in the county, or if the "county is divided, the division of "the county for which the court of "summary jurisdiction acted." At the hearing of the appeal before the County Court Judge of D., the complainant contended that the County Court Judge had no jurisdiction to hear the appeal. The County Court Judge of D., however, held that the appeal was properly brought to the Quarter Sessions for the County of D., and division of N., but stated a case for the opinion of the King's Bench Division as to whether his decision was right. *Held*, by the Court of Appeal (Andrews, L.C.J., and Brown, J.), that by section 24 (3) (*a*) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, it was enacted that the appeal should be made to the next Court of Quarter Sessions having jurisdiction in the county for which the Court of Summary Jurisdiction acted, and that the Court of Summary Jurisdiction acted for the County of A. and that the appeal should have been made to the County Court Judge and Chairman of Quarter Sessions of A. The question put by the County Court Judge was therefore answered in the negative. *R.* (*Kiernan*) *v. M'Geough*. [C.A. 49

SUMMARY JURISDICTION—SUMMONS FOR BEING IN POSSESSION OF BOVINE ANIMALS—*The Cattle (Import*

*from Eire*) *Order*, 1938—*The Eire* (*Confirmation of Agreements*) *Act*, 1938 (1 *& 2 Geo.* 6, *c.* 25), *section* 3 (3)—*The Live Stock Industry Act*, 1937 (1 *Edw.* 8 *& 1 Geo.* 6, *c.* 50), *sections* 7, 58 (1)—*Validity of Order—Jurisdiction—Whether Secretary of State for Home Department, the Secretary of State concerned with agriculture in Northern Ireland—Review of decision—Declining of Jurisdiction.* A summons was issued against J. J. It was charged against him that on 29th September, 1938, eighteen bovine animals were found in his possession at G., in the County of A. These cattle were seized as having been imported from Eire into Northern Ireland contrary to the provisions of The Cattle (Import from Eire) Order, 1938, made under the Live Stock Industry Act, 1937, and the Eire (Confirmation of Agreements) Act, 1938. This order purported to be made under section 3 (3) of the Eire (Confirmation of Agreements) Act, 1938, which provides that: "The "power of the Ministers under Part II. "of the Live Stock Industry Act, 1937, "to make orders for ensuring the due "making of subsidy payments under "that Act shall include power to make "orders regulating the times and "places at which cattle may be im-"ported from Eire into the United "Kingdom." "The Ministers," under Part II. of the Live Stock Industry Act, 1937, who are empowered to make orders are defined in section 58 (1) of that Act as being: "The "Minister of Agriculture and Fisheries "and the Secretaries of State respect-"ively concerned with agriculture in "Scotland and in Northern Ireland." At the hearing of the summons before the resident magistrate a preliminary point was made on behalf of the defendant that the Court had no jurisdiction to hear the case, the order being invalid as the Secretary of State for the Home Department was not shown to be the Secretary of State concerned with agriculture in Northern Ireland. An application was then made on behalf of the prosecutor for an adjournment to enable the necessary evidence to be produced dealing with this preliminary point. This application was opposed on the ground that as the resident magistrate had no jurisdiction to hear the case, he had no power to adjourn. The resident magistrate yielded to this argument and declined to adjourn the case, and held that he had no jurisdiction. On an application to make absolute notwithstanding cause shown a conditional order for a writ of certiorari to remove into the King's Bench Division for the purpose of being quashed the order made by the resident magistrate, and also for the issue of a writ of mandamus directing the resident magistrate to hear and determine according to law the matter of the complaint. *Held*, by the King's Bench Division (Andrews, L.C.J., and Brown, J.), that in holding that he had no jurisdiction to hear the case the resident magistrate must have held that the orders were invalid on the ground that they had not been made by "the Ministers" duly authorised, and that such an order which was final and conclusive in form and character and was made without any evidence being tendered, could not stand. The Court therefore made absolute the conditional order for both certiorari and mandamus. *Brooke v. McCallum.* [K.B.D. 178

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*See* CRIMINAL INJURY.

VALIDITY OF ORDER—CATTLE (IMPORT FROM EIRE) ORDER 178
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